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Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

—v.—

THE SALVATION ARMY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 17, 1972.

Citations to Opinions Below

The opinion by the United States District Court for the Northern District of Georgia dismissing the complaint on jurisdictional grounds is reported at 323 F. Supp. 1110 (N.D. Ga. 1971), and is printed in the Appendix hereto at A. 1a. The opinion of the United States Court of Appeals, affirming the order of the District Court, but on

other grounds, is not yet reported, and is printed at A. 9a. The opinion of the District Court denying the petitioner, who had been previously authorized to proceed *in forma pauperis,* the right to a free transcript, is reported at 51 F.R.D. 215 (N.D. Ga. 1971), and is printed at A. 26a.

Jurisdiction

The judgment of the United States Court of Appeals was entered on March 17, 1972 (A. 32a). A timely petition for rehearing was acted upon by the Court of Appeals on April 26, 1972 (A. 34a), and this petition for certiorari was filed within 90 days of that date. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. A. Did Congress have the constitutional power, in enacting the equal employment opportunity provisions of the Civil Rights Act of 1964, to provide that all of the prohibited categories of employment discrimination, with the sole exception of religious discrimination, shall be applicable to employees of religious organizations, including employees who perform ministerial functions?

B. Is the First Amendment violated by §702 of Title VII of the Civil Rights Act of 1964 which exempts religious organization employers from the statutory prohibition of religious discrimination, otherwise applicable to all other employers, but does not exempt such employers from discrimination on grounds of race, color, sex or national origin?

2. Did the Court of Appeals, which found that the language and the legislative history of §702 of Title VII of the Civil Rights Act of 1964

> "compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin",

and then, concerned with the constitutionality of such statute, construed it as not intending to regulate the employment relationship between a church and those of its employees who are ministers, erroneously apply the doctrine of avoidance of constitutional questions, and misconstrue the teaching of *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346-49 (1936)?

3. Are religious organization employers constitutionally exempt from those provisions of Title VII of the Civil Rights Act of 1964 which prohibit punitive or retaliatory action against employees who file complaints of unlawful discriminatory activity?

4. Was petitioner entitled to proceed *in forma pauperis* in the District Court and in the Court of Appeals, to have a free transcript provided to her, and to have costs taxed in her favor in the District Court and in the Court of Appeals?

Statutes Involved

This case involves Title VII of the Civil Rights Act of 1964 (42 U.S.C. §2000e, et seq.).

§702 (§2000e-1.) *Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions.*

This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

§703 (§2000e-2.) *Unlawful employment practices—Employer practices.*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive

any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§704 (§2000e-3.) *Other unlawful employment practices—Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

§706 (§2000e-5.) *Enforcement provisions—Charges by persons aggrieved or member of Commission; copy of charges to respondents; investigation of charges; conference, conciliation, and persuasion for elimination of unlawful practices; prohibited disclosures; use of evidence in subsequent proceedings; penalties.*

• • •

Civil actions for prevention of unlawful practices; legal representation; commencement of action without payment of fees, costs, or security; intervention by Attorney General; stay of Federal proceedings.

(e) . . . Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. . . .

• • •

Attorney's fee; liability of Commission and United States for costs.

(k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

Statement of the Case

Petitioner filed a complaint with the Atlanta, Georgia office of the Equal Employment Opportunity Commission (EEOC) on May 20, 1970, that as a lieutenant in the Salvation Army she, and other women officers, received less salary and fewer benefits than similarly situated male officers in violation of §703(a) of Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e-2(a) (District Court complaint, Record in Court of Appeals, p. 270; references to Record hereinafter "R. ....."). On July 15, 1970, after the EEOC had failed to bring about Army compliance (R. 495), she instituted suit in the United States District Court for the Northern District of Georgia on the same charge against the Salvation Army Corporation of the Southern Territory (A. 1a).

The Salvation Army is a national corporation encompassing four regional corporations organized "for the purpose

of promoting the cause of Christian religion, charity and education" (A. 2a). It publishes and sells at a profit, *The War Cry*, a weekly national newspaper (A. 15a), and as of October 1969 counted 79,481 adults and 45,775 children in the United States among its membership (Deposition of Col. Longino, p. 9, included in Record of Court of Appeals).

Each territorial corporation has many of the attributes of a large and diversified corporation. As an employer, the Southern Territory Army alone pays over $7,000,000 annually to approximately 3,000 persons, not including its 1,330 officers. It administers and expends more than $147,000,000 over a six year period, and manages property valued as of 1969 in excess of $62,000,000. It receives $30,000,000 a year income (A. 15a), managing a total of 1,361 centers of operation, including stores, maternity homes and hospitals, men's and women's welfare residences, day care centers, boys' clubs, youth clubs, camps, lodges, residences, and social service centers (Affidavit of Mrs. McClure, R. 430).[1]

One of the major tenets of the Salvation Army organization, constituting Chapter XII, "The Position of Women," of The Salvation Army Orders and Regulations for Officers, is the principle that Army women are the equals of men. Paragraph 1 of Chapter XII sets forth the "Army Principle" as follows:

> "One of the principles of the Army is that women have the right to an equal share with men in the work of publishing salvation to the world. A woman may hold any

[1] The financial and business affairs of the Southern Territory Army have been described in a 1966 Men's Social Service Program flyer: "We are now in big business, both for the extension of God's Kingdom as well as in our program of operation" (R. 435).

position of authority or power in the Army, from that of a local officer to that of General" (R. 422).[2]

In "principle", therefore, Salvation Army women should be treated equally with men. In fact, in petitioner's experience, they were not, and she undertook in the proceedings in the district court to substantiate her allegations.

Women officers who marry male officers of lower rank must revert in rank to that of their husbands. Each wife's assignment within the Army, furthermore, is determined by her husband's qualifications, rather than by her own. Neither policy is based on a religious tenet (Longino deposition, pp. 157-58).

A household assistance allowance is provided for those male officers whose wives are taken out of the home by Army duties so that they are unable to perform "the usual duties of a housewife"; single female officers who are similarly taken out of the home, however, do not receive such an allowance, even when, as in petitioner's situation, they have

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[2] Paragraph 2 of Chapter XII continues:

"The principle of equality is founded upon the claims and sanctions of the Bible and upon the remarkable ability which woman possesses for managing the affairs of the salvation war, and for influencing for God the hearts and consciences of the people.

"(a) The part woman has played in the Army's history and the influence which the exercise of her gifts and her self-sacrificing labours have won for the Army have secured for her in the future that place in its councils and campaigns which she has enjoyed in the past.

"(b) Only a spirit of envy and jealousy, hateful to God and man, would allow woman to toil in the background, and deprive her of the honours and the recognition to which she is entitled."

children at home (Longino deposition, p. 85; deposition of Col. Cone, p. 38, included in Record of Court of Appeals).

A married female Army officer whose husband dies, automatically reverts from a married officer's salary to that of a single officer. If the husband had been a member of the Army, she receives a widow's allowance which varies with the number of years of her husband's service. If, as in petitioner's situation, the husband had not been a member of the Army, she is not entitled to receive a widow's allowance (Longino deposition, pp. 103-05). On the other hand, a married male Army officer whose wife dies does *not* automatically revert to a single officer's salary. His case is, instead, referred for individual treatment "to the territorial headquarters for decision as to salary and allowances, citing all circumstances, for continued maintenance of a widower's home" (Longino deposition, p. 103). Again, this policy difference, like those cited above, is not based on a religious tenet (Longino deposition, p. 158).[3]

During her three-year tenure as a commissioned lieutenant in the Salvation Army, petitioner spent only seven months fulfilling a ministerial role; she was the commanding officer of an Army corps in Pascagoula, Mississippi. At the same time, however, she was its administrator, public relations manager, janitor, newspaper distributor, and

[3] That the Army recognizes that this principle of equality for women is not wholly respected in practice may be inferred from the provisions of Recommendation #6 of the Territorial Officers' Advisory Commission (September 25, 1969) urging "a study of feasibility of development in the following areas:" that a single woman be considered for advancement in each case on the basis of her qualifications; that women share in the decision-making with regard to Army policies; that widows' and widowers' allowances and salaries be exactly equal; that fringe benefits be equal for all officers, etc. (Cone deposition, p. 34, McClure Ex. #4).

fund raiser, activities which she considered to be half secular, half religious in nature (Deposition of Mrs. McClure, p. 86, included in Record of Court of Appeals).

For the duration of her Army career, petitioner performed essentially non-ministerial duties, all of which were capable of performance by any qualified lay person. She served as a Casework Supervisor in the Metropolitan Atlanta Welfare Department of the Salvation Army. As such, she was responsible for conferring with caseworkers concerning family in-take, assuring that proper referrals to other agencies were made, and maintaining adequate communication with other welfare offices. Both petitioner's predecessor and her successor as Casework Supervisor were lay persons (R. 423).

She also served as an office secretary to a Salvation Army Major, performing duties normally associated with such a position, until she was assigned in October 1969 as assistant secretary to the secretary of an Army Brigadier. The Brigadier's secretary, petitioner's immediate supervisor, was a lay woman. Both petitioner's predecessor and her successor on the job were lay persons (R. 423-24).

Throughout her Army career, petitioner struggled to maintain her three children and herself on a single officer's salary of only $35.50 a week (R. 424) plus minimal children's allowances. At the same time, she observed that widowers[4] in similar situations receive substantial household allowance, in addition to their salary, to ease the burden of family support (McClure deposition, pp. 110-14). Troubled by this inequity, petitioner frequently complained of it to

[4] A divorced woman is considered by the Army to be a widow; a divorced man, a widower (McClure deposition, pp. 97-98).

her supervisors. The response by petitioner's supervisors was to schedule a hearing to review her fitness as an Army officer (Longino deposition, pp. 219-20).

Petitioner's efforts within the Army at rectifying discrepancies between male and female compensation having been frustrated, she finally sought help elsewhere, filing a complaint with the EEOC. The June 4th publication in the *Atlanta Constitution* of an article concerning her complaint to the EEOC resulted in her immediate suspension (Longino deposition, pp. 127-28). Petitioner was subsequently found unfit to serve as an officer (R. 324), and was discharged, effective July 19, 1970, from the Salvation Army (R. 580). On June 11, 1970, prior to instituting suit in federal court, petitioner filed a second charge with the EEOC that she had been discharged only because of her discrimination-imposed financial hardships, her opposition to that discrimination, and her filing of a complaint with the Commission (R. 210).

The district court, after a lengthy discussion of the Salvation Army's good works, found that the Army is a religion (A. 5a), that petitioner was a volunteer rather than an employee of the Army (A. 7a), and that all of petitioner's activities as an officer—ministerial and secular alike—formed an integral part of the Army's religious functions (R. 582, 586). The court then granted defendant's motion to dismiss for want of jurisdiction (A. 8a), holding that §702 of the statute, 42 U.S.C. §2000e-1, exempts a religious organization such as the Salvation Army from any liability for any species of discrimination, despite clear statutory language in §702 that the exemption is limited to religious discrimination (A. 8a). The court, furthermore, assessed all costs against petitioner (A. 29a).

The court of appeals sharply disagreed with the district court on almost every issue. It found that the Army, though a religious organization, is an employer engaged in an industry affecting commerce, and as such may not escape the coverage of social legislation by showing that it was created for religious purposes (A. 15a); that petitioner was an employee of the Army (A. 17a); and that Congress did not intend §702 to exempt religious organizations from liability "for discrimination against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions, or privileges of employment" (A. 18a).

Notwithstanding its finding on Congress' intent, *supra*, as shown by the statute's legislative history,[5] the court of appeals affirmed the judgment below. Invoking the doctrine of *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 346 (1936), (A. 25a), the court determined that the question of the constitutionality of Title VII's application to petitioner and the Army could be avoided by finding that "Congress did not intend, through the non-specific wording

[5] The legislative history of Title VII reveals a conscious choice on the part of Congress to limit §2000e-1 (§702) exemption for religious organizations only to discrimination based on religion (A. 18a). The original House version of the section, then referred to as §703, provided for the broader all-encompassing exemption which respondent wishfully seeks to invoke. Congress specifically limited the House version in the final draft of the Act, however, and Senators Humphrey and Dirksen, both principal drafters of that final version, interpreted the revision as permitting religious organizations to choose persons to perform religious activities *only* on the basis of those persons' religion, not on the basis of their race, color, national origin, or, as is pertinent here, sex (A. 18a). See 110 Cong. Rec. 12722, 12818. The legislative history of the 1972 Equal Employment Opportunity Act, discussed *infra* n. 12, only reinforced this interpretation.

of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (A. 25a).

On petition for rehearing, the court of appeals reversed the lower court's assessment of costs against petitioner, ordering each party to bear its own costs (A. 34a). Petitioner had originally been allowed to begin her action *in forma pauperis,* as she was then still in the employ of the Salvation Army (R. 569). Upon her application for a copy of the transcript of the evidentiary hearing, however, the district court determined that petitioner's financial circumstances had so changed due to her Army discharge and her subsequent assumption of a school teacher's job, that her right to proceed *in forma pauperis* no longer existed (R. 571), despite her limited means and small income.

The district court also ordered that petitioner's motion for leave to appeal *in forma pauperis* be denied, although she was at the time $3,000 in debt (A. 31a). The court noted that her debts were of a non-recurring nature, and stated of its order: "While it may impose a hardship, it is no more so under the facts set forth than other litigants endure" (A. 31a). The court's order, on appeal to the Fifth Circuit, was affirmed, although petitioner was allowed to proceed on the original typewritten record and typewritten briefs (R. 612).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the Court of Appeals has decided important federal questions involving the constitutionality of certain provisions of the equal employment opportunity statutes, and the scope of the statutory exemption granted by Congress to religious organizations, which questions should be settled by this Court.

I.

The critical question in this case is whether the First Amendment gives a license to churches and other religious organizations to engage in racial, sexual, or national origin discrimination against their employees. The sex discrimination alleged in this case, which must be assumed to be true in the light of the district court's dismissal of the complaint on jurisdictional grounds, would be concededly illegal in the case of any non-church employer. The effect of the decision below is to leave thousands of employees of religious organizations uncertain of whether they are or are not protected by the equal employment opportunity statutes.

This is not a case where a church, or one or more of its adherents, are aggrieved by a statute which imposes a burden on the exercise of religious beliefs or practices. Cf. *Wisconsin* v. *Yoder,* —— U.S. ——, 32 L. Ed. 15 (1972); *Sherbert* v. *Verner,* 374 U.S. 398 (1963); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624 (1943). On the contrary, Congress expressly recognized in §702 that a religious organization should be able to make selections and rejections of employees—all em-

ployees—and to control their employment relationship, based on secularly unreviewable *religious* choices. Nor is there any claim made that the religious tenets of the Salvation Army authorize or require the unequal treatment of women.[6] On the contrary, Salvation Army doctrine requires equal treatment of women. See p. 7, *supra*.[7] What we have then is a religious organization which employs thousands of persons, and which is already authorized by law to discriminate on religious grounds, insisting—without any claim of religious liberty being infringed—that it should also have the right to discriminate on grounds of sex,[8] race or national origin. The Salvation Army is plainly asking for more than the free exercise of religion—it is asking for a preferred status of total immunity from the equal opportunity laws.

The court below reached a conclusion which allows this result because it failed to correctly evaluate the various constitutional and public interests involved. Citing *Presbyterian Church* v. *Hull Church*, 393 U.S. 440 (1969) and its predecessors, the court below apparently assumed that the mere fact that a church is involved in litigation with

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[6] Such might be the hypothetical case of a black person complaining of racial discrimination by a Mormon church organization, where the employer defends on the grounds that Mormon doctrine requires the discriminatory treatment.

[7] Indeed, it may be noted that the Salvation Army has historically bestowed high rank on some women. Cf. Shaw, *Major Barbara*.

[8] The Salvation Army would undoubtedly deny that it practices sex discrimination, and would point to its doctrinal requirement of equality for women. But in respect of discrimination on grounds of sex, there may well be the same difference between theory and practice as this Court has often noted in respect of discrimination on grounds of race. See *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

an employee who performed ministerial functions insulates it from judicial scrutiny, as a matter of constitutional right. But the *Hull* line of church property cases is clearly limited to disputes which "implicate controversies over church doctrine and practice." 393 U.S. at 445. The civil courts may indeed have "*no* role in determining ecclesiastical questions in the process of resolving property disputes," *id.* at 447. But it simply defies logic to apply this doctrine in such a manner as to immunize a religious corporation where there is *no* question of church doctrine or church practice, where there is no dispute over title to church property, where there is no ecclesiastical question at all.

It is simple enough to invoke the image of the "wall of separation" between church and state as the court below did (A. 19a). But it is axiomatic that every contact or confrontation between government and religion does not compel government to retreat, at the peril of unconstitutionality. In the words of Mr. Justice Frankfurter, religious freedom "does not and cannot furnish the adherents of religious creeds entire insulation from every civic obligation." *McGowan* v. *Maryland,* 366 U.S. 420, 461-62 (1961) (concurring opinion). See *Braunfeld* v. *Brown,* 366 U.S. 599 (1961);[9] *Prince* v. *Commonwealth of*

[9] Chief Justice Warren wrote in *Braunfeld*:

> "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday

Massachusetts, 321 U.S. 158 (1944); *Jacobsen* v. *Massachusetts*, 197 U.S. 11 (1905); *Reynolds* v. *United States*, 98 U.S. 145 (1878).

Churches and other religious organizations have been held constitutionally subject to the Fair Labor Standards Act, *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954); the National Labor Relations Act, *Cap Santa Vue, Inc.* v. *NLRB*, 424 F.2d 883, 887 (D.C. Cir. 1970); the Internal Revenue Code, *Parker* v. *Commissioner of Internal Revenue*, 365 F.2d 792, 795 (8th Cir. 1966); the Federal Food, Drug and Cosmetic Act, *Church of Scientology of California* v. *Richardson*, 437 F.2d 214, 217 (9th Cir. 1971); see also *U. S.* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1965) (holding against an "ordained minister of the Neo-American Church", *id.* at 442, who claimed the constitutional right to use hallucinogenic drugs as part of a religious ceremony). Yet without any analysis of these cases and the doctrines which they reflect, much less any rationale of distinction, the court of appeals in this case of first instance effectively swept away the protection of the federal anti-discrimination statutes from thousands of intended beneficiaries.[10]

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impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly endless." 366 U.S. at 606.

[10] The court below observed that its decision is restricted to the "church-minister relationship" (A. 10a). Yet no such distinction may be found in any of the above-cited cases. Indeed *Prince*, *Parker* and *Kuch*, all *supra*, all involved persons regarded by their respective churches as ordained ministers. And in *Gallagher* v. *Crown Kosher Super Market*, 366 U.S. 617, 630-31 (1961), a companion case to *Braunfeld* and *McGowan*, *supra*, the unsuccessful

The court below recognized the propriety of the compelling governmental interest analysis of *Sherbert* v. *Verner, supra* (A. 19a). But it misapplied the first two elements and left out the vital third element. The *Sherbert* test requires, first, a determination of whether there is an infringement on free exercise; second, a determination of whether the governmental interest which causes the infringement is merely "rational" or, in fact, "compelling"; and, third, an analysis of whether or not the governmental interest could be satisfied by a less onerous alternative. See *In re Jennison,* 375 U.S. 14 (1963), *on remand* 267 Minn. 136, 125 N.W.2d 588 (1963). In this case, (1) there is no visible infringement of religious liberty, but merely a claim by the Salvation Army that any governmental regulation violates its religious liberty; (2) the governmental interest in eradicating invidious discrimination based on sex, race or national origin, expressed in Title VII of the Civil Rights Act of 1964, and reflecting a bitter history of strife and divisiveness with which all are familiar, is no less than *compelling;* see *Heart of Atlanta Motel* v. *United States,* 379 U.S. 241, 245-46 (1964); (3) there has been no effort to demonstrate the existence of a less onerous alternative, and we submit that there is none. Compare *Sherbert* v. *Verner, supra; In re Jennison, supra.*

In sum, the courts below appear to have been chilled by dire predictions of raging torrents of religious strife. See Brief of Defendant-Appellee in court of appeals, p. 30; Brief of National Headquarters of Salvation Army, as

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plaintiffs included orthodox rabbis who complained that the Massachusetts Sunday Law interfered with and greatly complicated their rabbinical functions.

amicus curiae, pp. 26-27, 40-41. It is perhaps not unnatural for any employer to resist government regulation and expansion of employee rights with every possible argument. See *Associated Press* v. *NLRB*, 301 U.S. 103 (1937); *Polish National Alliance* v. *NLRB*, 322 U.S. 643 (1944).[11] But it is no service to the cause of religious liberty to allow its invocation to undermine the strong federal policy of equal employment opportunity for women. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Mengelkoch* v. *Industrial Welfare Commission*, 442 F.2d 1119, 1126-27 (9th Cir. 1971); *Weeks* v. *Southern Bell Telephone & Telegraph Co.*, 408 F.2d 228, 236 (5th Cir. 1969). This Court should grant certiorari and properly settle the question in a manner which will safeguard equal employment opportunity without in any way damaging religious liberty.

II.

Certiorari should also be granted because the court of appeals, in its announced effort to avoid a constitutional decision, misapplied the doctrine of *Ashwander* v. *Tennessee Valley Authority*, *supra*. The court of appeals first considered the plainly erroneous holding of the district court that the Salvation Army was totally exempted by §702 (A. 7a). Review of the legislative history compelled the conclusion that only a limited exemption was intended—for religious discrimination—and no more. The court below

[11] A newspaper will not be insulated from otherwise valid regulation of economic activity merely because it also engages in constitutionally protected dissemination of ideas. *Lorain Journal Co.* v. *United States*, 342 U.S. 143, 155-56 (1951). The same principle does not insulate a newspaper from compliance with §804(c) of the Civil Rights Act of 1968, 42 U.S.C. §3604(c), which prohibits the publication of discriminatory advertisements. *U. S.* v. *Hunter*, —— F.2d —— (4th Cir. 1972), 40 U.S.L.W. 2738 (Apr. 27, 1972).

was clearly correct and its decision is supported by even more legislative history than that which was cited.[12]

Then the court of appeals considered whether the religion clauses of the First Amendment allowed a religious organization to be subject to any anti-discrimination regulation at all. It is clear from the opinion below that the court of appeals concluded that the Constitution protected the Salvation Army in any sex discrimination it wished to practice on Mrs. McClure. But after marching up the hill, and then down again, the court of appeals stops just before it reaches

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[12] See n. 5, *supra*. §702 was amended in 1972, and now reads as follows:

"This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."

Most significant was an amendment offered by Senator Ervin which would have provided a complete exemption from Title VII to religious organizations, exactly the position for which the Salvation Army contends. The Senator described his proposed amendment as follows:

"An amendment that says the EEOC shall have no jurisdiction at all over religious institutions . . . I would allow the religious corporation to do what it pleased . . . I am trying to take the political hands of Caesar off all religious associations and off all religious societies. I am trying to take them even off the National Council of Churches." (Cong. Rec. S. 919, Feb. 1, 1972)

The amendment, however, was soundly defeated in the Senate by a vote of 55 to 25.

The legislative history of the amendment makes it crystal clear that Congress understood that religious organizations "remain subject to the provisions of Title VII with regard to race, color, sex or national origin." Conference Report, Section-by-Section Analysis, Cong. Rec. (H. 1862), March 8, 1972. C.C.H., New 1972 Equal Employment Opportunity Law—With Explanation, ¶511.

its intended destination and concludes with an unexplained invocation of the *Ashwander* doctrine. Rather than hold the statute unconstitutional, in accordance with its apparent conviction, it holds without explanation that Congress did not intend to do that which the words of §702 plainly indicate Congress did intend (A. 25a).

Perhaps the court is implying that Congress only intended non-minister employees of churches to be covered. But what about the part-time minister, or the adherents of churches all of whose members regard themselves as ministers? Cf. *Prince* v. *Commonwealth, supra.*[13] Is every Jehovah's Witness employed in the Brooklyn, New York printing plant of the Watchtower Bible and Tract Society to be subject to racial and sexual discrimination because of "ministerial" status?

But there is no support in the legislative history for the court's strained construction. And Mr. Justice Brandeis, the author of the *Ashwander* doctrine, never intended an alternative statute-saving construction, unless it was "fairly possible". 297 U.S. at 348. Mr. Justice Cardozo warned in *Moore Ice Cream Co.* v. *Rose,* 289 U.S. 373, 379 (1933):

> "But avoidance of a difficulty will not be pressed to the point of disingenuous evasion. Here the intent of the Congress is revealed too distinctly to permit us to ignore it because of mere misgivings as to power. The problem must be faced and answered."

Mr. Justice Harlan, in his concurring opinion in *Welsh* v. *United States,* 398 U.S. 333, 347 (1970), discussed the limits of the *Ashwander* doctrine:

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[13] As of 1969, the Jehovah's Witnesses were reported to have 359,146 members in the United States. *1972 Information Please Almanac, Atlas and Yearbook,* p. 153.

> "I cannot subscribe to a wholly emasculated construction of a statute to avoid facing a latent constitutional question, in purported fidelity to the salutary doctrine of avoiding unnecessary resolution of constitutional issues . . . " *Welsh, supra,* 398 U.S. at 354.

The fault with the decision below is that neither the words nor the legislative history, nor any elucidation of legislative policy, justify the court's unexplained construction. This Court should grant certiorari and declare that the constitutional question must be met, and, we respectfully submit, the constitutional question should be decided in petitioner's favor. See pp. 14-19, *supra.*

III.

The court of appeals noted that Mrs. McClure had a second grievance against her employer in addition to her claim that she was the victim of illegal sex discrimination. She also alleged that she was discharged because of her complaints of discriminatory practices (A. 11a). Retaliatory or punitive discharge is expressly and independently prohibited by §704(a) of Title VII, and it is therefore unfortunate that neither of the courts below ruled on this question.

Nevertheless the effect of the ruling seems to be that the Salvation Army's status as a church gives it plenary authority not only to discriminate on grounds of race, sex or national origin, but to have the unlimited and unreviewable power to discharge or otherwise retaliate against any employee who dares to complain about discrimination. This is plainly contrary to the statutory policy of encouraging access to the Equal Employment Opportunity Commission,

Pettway v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969). Obviously, this policy embraces all charges, false as well as true, and certainly charges which are not within the coverage of the statute as well as those that are clearly covered. *Pettway, supra,* 411 F.2d at 1007. The courts below, therefore, erred in not recognizing that even if the Salvation Army's status as a church exempted it from the §703 claim of sex discrimination, it did not exempt it from the §704 claim of retaliatory discharge.

In an analogous context involving employee grievances under the National Labor Relations Act, this Court was unanimous in striking down a Florida statute which denied unemployment insurance to workers who were subjected to retaliatory discharge after filing NLRB complaints. *Nash* v. *Florida Industrial Commission,* 389 U.S. 235, 238 (1967): "Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board." *Ibid.* The federal policy of protecting access to the EEOC is expressed in even broader language, *Pettway, supra,* 411 F.2d at 1006, n. 18. Certiorari should be granted so that this Court can settle this important federal question.

IV.

The district court, in denying petitioner's motion for leave to appeal *in forma pauperis* noted that her hardship in this case was no greater than that which other litigants normally endure (A. 31a). Petitioner, however, should not have had to undergo even that amount of hardship, for in suing under Title VII of the 1964 Civil Rights Act she was acting "not for [her]self alone, but also as a 'private attorney general'." *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400, 402 (1968).

When petitioner brought her suit, and when she appealed the dismissal of her complaint to the Fifth Circuit, the EEOC was not empowered to enforce the act it was established to administer, but had to rely for enforcement on private individuals or on the Attorney General.[14]

To encourage individuals to assume the enforcement burden for the Act, Congress authorized the courts in §706(e), 42 U.S.C. §2000e-5(e), to appoint an attorney for the plaintiff and/or to allow commencement of plaintiff's action without fees, costs or security, *supra,* p. 6. The specific inclusion in Title VII of what is in effect an *in forma pauperis* provision, despite the existence elsewhere of a recognized statute dealing with *in forma pauperis* proceedings, 28 U.S.C. §1915, can only suggest Congress' strong concern that limited means and small income not stand as a deterrent to valid action under that title. *Edmonds* v. *E. I. duPont de Nemours and Co.,* 315 F. Supp. 523, 525 (D. Kans. 1970). Complainants under Title VII should be free to sue without fear of incurring costs that would, as in petitioner's case, set them deeper into debt.

Although the court of appeals, in response to the petition for rehearing (A. 34a), eased petitioner's burden to the extent of not requiring her to pay the Salvation Army's costs, she was still obliged to pay her own costs, an obligation, which, we submit, she should not have had to undertake at all.

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[14] 42 U.S.C. §2000e et seq. did not include the power to institute suits. On March 13, 1972, Congress amended Title VII so as to give the EEOC such power: "§706(f)(1) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a governmental agency, or political subdivision named in the charge."

Certiorari should be granted for the purpose of deciding what degree of indigency a Title VII litigant must satisfy before the court will allow him or her to proceed *in forma pauperis*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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* Attorneys for petitioner gratefully acknowledge the valuable research and editorial assistance of Ms. Helen Rosenberg, second year student at New York University School of Law.

** Passed New York bar examination, and currently awaiting admission.

APPENDIX

APPENDIX

Opinion of the United States District Court for the Northern District of Georgia

Mrs. Billie B. McCLURE

v.

The SALVATION ARMY.

Civ. A. No. 13955.

United States District Court,
N. D. Georgia,
Atlanta Division.

March 8, 1971.

roceeding on motion of defendants smiss civil rights complaint for of jurisdiction. The District , O'Kelley, J., held that not only is lvation Army a "religious corpora- within civil rights statute provid- hat equal employment provisions ot apply to a religious corporation espect to employment of individu- perform work connected with ng on of its religious activities, y allowance, salary, or funds re- by its officers, their work assign- or places of employment are mat- f "religious activity" within stat- that officers work voluntarily for us reasons, attend special school prepare them for their work, and onsidered as ordained ministers attending to rituals of a temporal .

otion sustained.

Civil Rights ⇐1

Not only is the Salvation Army a "religious corporation" within civil rights statute providing that equal employment provisions shall not apply to a religious corporation with respect to employment of individuals to perform work connected with carrying on of its religious activities, but any allowance, salary, or funds received by its officers, their work assignments or places of employment are matters of "religious activity" within statute, in that officers work voluntarily for religious reasons, attend special schooling to prepare them for their work, and are considered as ordained ministers when attending to rituals of a temporal nature. Civil Rights Act of 1964, §§ 701 et seq., 702 42 U.S.C.A. §§ 2000e et seq., 2000e-1.

See publication Words and Phrases for other judicial constructions and definitions.

Haas, Holland, Freeman, Levison & Gilbert, Atlanta, Ga., for plaintiff.

Hansell, Post, Brandon & Dorsey, Atlanta, Ga., for defendant.

OPINION AND ORDER INCLUDING FINDINGS OF FACT AND CONCLUSIONS OF LAW

O'KELLEY, District Judge.

The plaintiff, a female officer of the Salvation Army, filed a Complaint pursuant to Title VII, Civil Rights Act of 1964, 42 U.S.C. § 2000e.

The defendant has filed its answer, and along with that, a motion to dismiss for want of jurisdiction, *inter alia*. It argues that it is a religious body or society as contemplated by the statute con-

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fied in 42 U.S.C. § 2000e–1 and that its employees and those of the officers of the Army are religious in nature and thus exempt under the law.

The pertinent part of that section reads:

"This subchapter shall not apply * * * to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities * * *."

A hearing was held as to that issue on November 23, 1970, and the Court makes the following findings of fact and conclusions of law based upon the evidence presented at that time.

1. FINDINGS OF FACT

The defendant is a corporation organized in 1927 under the laws of the State of Georgia and formed for the purpose of the location of a church in the County of Fulton, State of Georgia, and for the purpose of promoting the cause of Christian religion, charity and education in other localities throughout the State of Georgia and elsewhere. The Southern Territory of The Salvation Army extends from the border of Pennsylvania down to Guatemala in Central America and is composed of eleven divisions. A division is commanded by a division commander who has a staff and who is responsible to the Territorial Headquarters which for the Southern Territory is located in Atlanta, Georgia. Under the divisions there are corps ranging in number from seven to fifty. There are many corps within the Southern Territory.

The Salvation Army Corps is a family center for the dissemination of the Gospel, for the development of Christian life, and for the outreach in the particular community in which it is located. It is similar to any other church. It has a senior segment, a youth segment or Christian education department, and many other things that other churches have, including a structure for lea ship training, and emergency trai for disasters. The commanding of of a corps acts as the "pastor" of corps, but both the corps and every other officer of the a tioned in the locality perform the fu tion of preaching to the congregat

The defendant conducts a Daily V tion Bible School, which is also a nor church function. There is a H League Department which is the equ lent of training for home service an particularly for married women. T are senior citizens' clubs in practic every corps. There is also a Salva Army band unit and a chorus in mos the corps. There is a group of local ficers in most corps known as the C Council. There is also a group kn as the Census Board which operates affairs of the corps.

The corps is also called upon t many things outside of its preac ministry. There is a regular prog for the visitation of homes. Foo provided to the needy and referral the sick are made to doctors and h tals and other charitable functions.

There are approximately 1300 off serving in the Southern Territory. officer is one who has first receiv divine call from God and has bee cepted and trained and commissione a Salvation Army officer. Being missioned in The Salvation Army i equivalent to ordination. Officer The Salvation Army are not perm to have any outside employment ever. Training of the officer consis a two-year session of training. Th ficer is equivalent to the clergy o church and can perform the four ceremonies of the Army which in the swearing in of soldiers, perfor marriages, burials and dedicatio children. Salvation Army officers served as chaplains in World W World War II and in Vietnam.

Officers are also divided into tw sic classifications as to assign field and staff officers. Their

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tinction in wages or allowances, but re is a distinction in the duties per-rmed. A field officer has the same mmon responsibility of a parish priest of a Presbyterian or Baptist clergy-n, being responsible for a congrega-n. Staff officers are similarly quali-d to perform the ceremonies of the urch, hold retreats and attend offi-rs' councils, but are assigned specific nctions in divisional or territorial adquarters.

While The Salvation Army officer is uivalent to the clergy of another urch, the Salvation Army soldier is uivalent to the laity of another urch. The Salvation Army has vari-s steps that one must take before com-g to soldiership. A person who is not filiated with any church, who does not im the Christian experience, must rst go through a training program, lled training for senior soldiership. ldier applicants must become familiar ith the doctrines, the steps that a per-n must take before becoming a Chris-an, must undergo a preliminary proba-on time, be reviewed by a census ard, and then be accepted as a soldier a ceremony conducted at a public eeting under The Salvation Army flag d under the flag of the Country. his is called the swearing-in ceremony d is used by The Salvation Army as s form of acceptance into the church. soldier is a layman and can be any per-n of any background in the communi-.

A person who does not have any other urch affiliation, but is not prepared to ake a commitment for Christian serv-e and witness as a Christian, but who ants to have his name on a church roll r the purpose of burial, is known as n "adherent." In addition to adher-nts, there are persons known as "friends" who attend The Salvation rmy services, but never become affili-d in any way. Numerous others are filiated with the Army as "volun-ers," lending moral support to The lvation Army through membership on Advisory Boards and Women's Auxiliaries.

There is also a classification known as "employees," of which there are approximately 3,000 in the Southern Territory. Employees may be of any race, any background, any origin, and they generally bring with them certain needed skills, ranging from doctors to laborers, but they are never commissioned officers of the Army.

The Salvation Army has certain Orders and Regulations which serve as guidelines by which it operates. These Orders and Regulations outline the conduct of individuals, the steps to be taken in the performance of ceremonies, how to conduct meetings, etc. The Salvation Army has its own doctrine which is contained in The Salvation Army Handbook of Doctrine.

The original mission of The Salvation Army has remained unchanged. It is to seek the unsaved, to secure the commitment of those who are determined to live a Christian life, to give such people an opportunity for serving, remembering that membership in The Salvation Army, even as a soldier, imposes a greater burden upon an individual than he would assume by belonging to another church. The Salvation Army encourages the wearing of a uniform regularly and the participation in open air meetings. The soldier is identified by his uniform and marked out as a Salvationist. The Army has four major ceremonies: the swearing-in of soldiers, marriage, burial, and dedication of children. Religious services are held on Sundays and other days. They have all the elements of a Christian witness service. They have a preaching part, congregational singing, scripture reading, prayer and the invitation to be saved.

Mrs. Billie B. McClure was enrolled as a Junior Soldier as a child in The Salvation Army and attended religious meetings and services. Her original application to The Salvation Army, dated 1961, was not approved. She renewed [illegible]

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state presented her application to the Army for officership on or about April 15, 1965. She finished four years of college, going two years to San Angelo Junior College, and finished the remainder of her work at North Texas State University in Denton, Texas, receiving a bachelor of science in elementary education. She received a teacher's certificate from the State of Georgia and is presently engaged in teaching school with the Newton County Education Department in Newton County, Georgia.

Mrs. McClure entered The Salvation Army Officers' Training School in September of 1965. She studied the Bible and doctrine, bookkeeping, and Orders and Regulations for officers. Courses in music, band, songsters, education, religious education, publicity and public relations were also taught, as were certain elective courses, such as creative writing. She was first sent into the field to serve as a Salvation Army Officer (Cadet Lieutenant) in June, 1966; her first assignment was at Camp Hoblitzele in Texas. In August of 1966 she was assigned to Little Rock, Arkansas as Commanding Officer of the Little Rock Citadel Corps. She served in Little Rock from August, 1966, to May, 1967. She was next assigned as Commanding Officer of the Corps at Pascagoula, Mississippi, from June, 1967, to January, 1968. She next served as the Casework Supervisor in the Georgia Division in Atlanta, Georgia, from February 1, 1968, through October, 1969. Her final assignment in The Salvation Army was as a secretary in the Public Relations Department of the Southern Territorial Headquarters. The plaintiff, Mrs. McClure, regarded herself as a minister of the Gospel and as performing a religious function for the church at all times.

While serving as Commanding Officer of the Citadel Corps in Little Rock, Mrs. McClure was in charge of all senior and young people's character building programs. She also had charge of corps finances for local purposes and territorial appeals. She was responsible for the sale of The Salvation Army literature and was responsible for the [illegible] monthly reports that had to be [illegible] Divisional Headquarters. She was authorized to perform all of the religious ceremonies of The Salvation Army, including the swearing-in of soldiers, dedicating of babies, conducting all religious services, conducting marriages and officiating at funerals. She [illegible] in one member at Little Rock. She served as the Commanding Officer of the Pascagoula, Mississippi Corps. Her functions as a minister were the same in Pascagoula as at Little Rock except that they were enlarged somewhat because of her responsibility for all of the welfare and public relations and fund-raising programs. She conducted the Sunday School and a morning worship service on Sunday. She had a Bible class on Sunday afternoon for teenagers who were Corps Cadets. She also held a worship service on Sunday evening and a prayer meeting on Wednesday nights. In addition to these services, Mrs. McClure had interviews with applicants for emergency welfare assistance. There were also constant calls from county and state welfare agencies asking the Salvation Army to participate in various community services.

Mrs. McClure requested in September of 1967, while in Pascagoula, to be relieved from corps work because she did not feel that she could handle all of the work that had to be conducted. She requested staff duty.

Mrs. McClure's superior officer, Casework Supervisor in Atlanta, Georgia, was Major James Childs, who was the administrator of the Welfare Department. Mrs. McClure's duty in this position was to coordinate the Emergency Welfare Service for the Metropolitan Area of Atlanta through the Welfare Department and emergency welfare service and family welfare service.

While working as Casework Supervisor, Mrs. McClure estimated that she spent four hours a week in corps activities; an hour for teaching [illegible]

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...ol class, an hour for work in Bible ..., an hour for band practice, and an ... for song practice. She attended ...rvices at the Temple Corps on Seminole ...enue in Atlanta on Sunday mornings ...a member of the Temple Corps. She ...o volunteered to be a Sunday School ...cher at the Temple Corps.

...In her last assignment in the South... Territorial Headquarters, Mrs. Mc... ...re worked primarily as a secretary in ... Public Relations Department.

...Mrs. McClure felt that she was the ...ritual leader of both the congrega... ...s in Little Rock and Pascagoula ...le serving as the Corps commander ...these respective corps. While serving ... Casework Supervisor in the Geor... ... Division at Atlanta, she conducted ...yer services with the people that she ...s visiting and assisting, and she felt ...t these religious activities were an ...portant part of her casework minis... ... While serving in her last assign... ...nt in the Public Relations Depart... ...nt at Territorial Headquarters, she ...ld engage in a prayer service known ...her as a "knee drill prayer meeting." ... McClure considered herself as per...ming a religious function for The ...ation Army, even while sitting be... ...d a typewriter merely typing a letter. ...e was serving as a commissioned offi... ...nd as an ordained minister of the ...ation Army in her final job assign... ...nt in the Public Relations Depart... ...nt of the Southern Territorial Head...arters.

...Mrs. McClure's officership with The ...ation Army terminated on July 19, ...

II. ISSUES AND OPINION

...Thus, the issues brought to a head are ... First, is The Salvation Army a re...ion, and second, were the activities ...ursued by Mrs. McClure of a reli... ...s nature?

...The Salvation Army has always been ...wn as a charitable body, but the ...tion of its being a religion has rare...

The rights guaranteed under the First Amendment of our Constitution are inalienable and personal. But the question of what is a religion as interpreted by the law has remained hazy throughout this country's existence. There have been various definitions for different purposes such as the test for a conscientious objector.

Without strict guidelines, nevertheless, this Court is of the opinion that The Salvation Army is a religion regardless of its lack of traditional houses of worship. The Salvation Army has been referred to as a body which practices religion. This was in a strong dissenting opinion in Prince v. Massachusetts, 321 U.S. 158, 64 S.Ct. 438, 88 L. Ed. 645 (1942).

But, more to home, The Salvation Army is a corporation organized and existing under the laws of Georgia formed for the purpose of the location of a church in Fulton County and for the purpose of promoting the cause of Christian religion, charity and education in other localities, in and out of Georgia.

The Supreme Court of Georgia has likewise held The Salvation Army to be a religion. In Bennett v. City of LaGrange, 153 Ga. 428, 433, 112 S.E. 482, 485 (1922) it ruled:

> "A religious sect or denomination is one having a common system of faith. State v. Township 9, 7 Ohio St. 2. The term 'church' is one of very comprehensive signification, and imports an organization for religious purposes, for the public worship of God. * * * The Salvation Army is a benevolent and religious institution. It is likewise a church on wheels. It has the custody and control of all the temporalities and property belonging to the Salvation Army in the United States, and the revenues therefrom. It administers these revenues in accordance with its discipline, rules and usages. Its entire receipts, revenues and emoluments are devoted exclusively to its benevolent and philanthropic purposes, with the exception of a mod-

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erate and reasonable compensation to those conducting and managing its affairs. Its work is primarily directed to the spiritual, moral, and physical reformation of the working classes, to the reclamation of the vicious, criminal, dissolute, and degraded, to visitation among the poor, lowly, and sick; and to the preaching of the gospel and the dissemination of Christian truth by means of open-air and indoor meetings. So it preaches the gospel. It disseminates Christian truth. *It is a church, a sect, and a religious institution.*" [Emphasis added.]

See also Salvation Army v. United States, D.C.N.Y.1956, 138 F.Supp. 914. Moreover, the plaintiff seems to have no issue with the Army's reference to itself as a religion.

We then come to the issue requiring a balance of duties by religious bodies to secular laws and the rights guaranteed by The First Amendment and granted under 42 U.S.C. § 2000e–1.

To decide whether the duties which a member of a religious group performs fall within the category of "religious activities" under § 2000e–1, is not an easy matter.

Nevertheless, to aid in deciding what is or is not religious activity, the Court looks to United States v. Kuch, 288 F. Supp. 439 on pages 443–444 (D.C., Dist. of Col., 1968) wherein the Court held:

"The dividing line between what is, and what is not, a religion is difficult to draw. The Supreme Court has given little guidance. Indeed, the Court appears to have avoided the problem with studied frequency in recent years. Obviously this question is a matter of delicacy and courts must be over careful not to permit their own moral and ethical standards to determine the religious implications of beliefs and practices of others. Religions now accepted were persecuted, unpopular and condemned at their inception."

"Subtle and difficult though the inquiry may be, it should not be avoided

for reasons of convenience. [illegible] need to develop a sharper line of demarkation between religious activ[illegible] and personal codes of conduct t[illegible] lack spiritual import. Those who s[illegible] the constitutional protections for th[illegible] participation in an establishment [illegible] religion and freedom to practice [illegible] beliefs must not be permitted the [illegible] cial freedoms this sanctuary may p[illegible] vide merely by adopting religious [illegible] nomclature and cynically using it a[illegible] shield to protect them when parti[illegible] pating in antisocial conduct that o[illegible] erwise stands condemned. In a co[illegible] plex society where the requirements [illegible] public safety, health and order m[illegible] be recognized, those who seek immu[illegible] ty from these requirements on re[illegible] gious grounds must at the very le[illegible] demonstrate adherence to ethi[illegible] standards and a spiritual discipline."

That Court further noted on page [illegible] that:

"The public interest is paramo[illegible] and if properly determined the C[illegible] gress may inhibit or prevent acts [illegible] opposed to beliefs even where th[illegible] acts are in accord with religious c[illegible] victions or beliefs. If individual re[illegible] gious conviction permits one to [illegible] contrary to civic duty, public he[illegible] and the criminal laws of the la[illegible] then the right to be let alone in o[illegible] belief with all the spiritual peac[illegible] guarantees would be destroyed in [illegible] resulting breakdown of society."

Getting to specifics, the Court in *Kuch* case, referred to examples of c[illegible] duct which is regulated by law with[illegible] offending the First Amendment.

"Mormons were not permitted [illegible] practice polygamy. Nor would [illegible] Constitution protect the practice [illegible] religions requiring infanticide, [illegible] killing of widows, or temple prost[illegible] tion, as some religions have done [illegible] the past. The vital significance [illegible] the constitutional protection of re[illegible] gion will be diluted by a degree th[illegible] erance that accepts the [illegible]

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which leave society helpless to
tect itself."

se were religious activities, at
to those sects, but is welfare work,
al work, and other normally secular
religious because it is done under
spices of the religious corporation,
The Salvation Army? Is a reli-
activity limited to ceremonial or
listic functions? Or, does it include
rt operations which people perform
day in the world of business?

the case of Prince v. Massachu-
supra, the law, as affirmed by the
, invaded the province of the
h. There, the Court explained that
gh the selling of literature was
dered a religious activity by de-
nts and one which the Court would
spute as being one of personal be-
it denied the children involved the
ege of selling literature if under
en. We refer to the decision be-
selling of religious literature was
dered a religious activity. That
may be distinguished from the
t case in its results. The statute
ed in the present case provides an
ption for religious organizations
ying its members in a religious ac-
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many more traditional religious
, laymen and laywomen who are
ers of the congregation volunteer
perform work of a secretarial, ad-
trative and clerical nature without
ensation, yet their work is not con-
d a purely religious function as
d be the work of the minister,
t or rabbi, but it could be work con-
d with the carrying out of its reli-
activities.

me visitation or in-town mission-
ork by laymen would be of a reli-
nature even though it may be per-
ed by laymen.

mbers of the officer corps of The
tion Army receive a pittance for
holy work but then do not many
s of various orders if they receive
ing at all.

Would not the teaching of a nun or priest in a parochial school be considered religious activity? We think that the nexus between the parochial school and the religious body would require that their work be called "religious activity."

Since the work of officers in The Salvation Army is voluntary for religious reasons, as stated by William E. Chamberlain, Commander of the Southern Territorial Headquarters in his affidavit of August 14, 1970, and in his testimony at the hearing, and since Mrs. McClure attended special schooling intended to prepare her for her work with The Salvation Army, and since she is considered an ordained minister of The Salvation Army, and having attended to some rituals of a temporal nature, the Court, in considering the uniqueness of the manner in which The Salvation Army practices its religion, holds that Mrs. McClure's activities, which might seem secular, such as secretarial work, are supportive of her overall role yet an integral part of the Army's purely religious functions and activities. The Salvation Army does not maintain great cathedrals or traditional houses of worship but take their message to the people, whether in welfare work, on the street, in a social services building or in a small church. Therefore, the Court feels that any allowance, salary, or funds received by the Officers, their work assignments or their places of assignment, among any other grievances Mrs. McClure may have, are matters of religious activity into which the Court may not inquire under prior decisions and § 2000e–1. It is significant to note that Mrs. McClure performed some functions which only an officer (ordained member) might perform. It is even more significant that plaintiff affirmed that she considered herself performing a religious function while doing certain mundane tasks, such as typing. These activities when considered as an integral whole, demonstrate adherence to ethical standards and a spiritual discipline.

LOSE TO EDGE

For these reasons, the Court concludes that the activities of Mrs. McClure were connected with, carried on by, or in the religious activities of The Salvation Army in accordance with 42 U.S.C. § 2000e-1.

Therefore, the Motion to Dismiss the Complaint for want of jurisdiction is sustained, and it is so ordered.

POOR COPY

Opinion of the United States Court of Appeals for the Fifth Circuit

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. McCLURE,
Plaintiff-Appellant,

versus

THE SALVATION ARMY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

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(March 17, 1972)

Before WISDOM, COLEMAN and SIMPSON, Circuit Judges.

COLEMAN, Circuit Judge: The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers, see facts set forth in the published opinion of the District Court, *McClure v. The Salvation Army*, 323 F. Supp. 1100 (N.D., Ga., 1971).

Mrs. McClure brought suit below, dismissed for lack of jurisdiction, which requires a determination of

whether Title VII of the Civil Rights Act of 1964 [42 U.S.C., §2000e, et seq.] applies to the employment relationship between a church and its ministers and, if applicable, whether the statute impinges upon the Religion Clauses of the First Amendment.[1] Restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy, we affirm the judgment rendered below.

After undergoing a two year training period at The Salvation Army's Officers Training School, Mrs. McClure was commissioned as an officer [minister] in June, 1967. She then received various assignments within the Southern Territory, first as a Corps Commander, next as a Welfare Casework Supervisor in Divisional Headquarters, and finally as a secretary in the Territorial Headquarter's Public Relations Department.

After her officer status had been terminated by The Salvation Army, Mrs. McClure began a civil action against that organization in the United States District Court for the Northern District of Georgia, alleging that it had engaged in discriminatory employment practices against her in violation of Title VII.[2]

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[1]The First Amendment of the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof * * *."

[2]Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a) reads as follows:

"(a) It shall be an unlawful employment practice for an employer —

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, con-

More specifically, she alleged that she had received less salary and fewer benefits than that accorded similarly situated male officers, also that she had been discharged because of her complaints to her superiors and the Equal Employment Opportunity Commission [EEOC] with regard to these practices.

She sought reinstatement, an injunction against further discriminatory practices, and a judgment for the alleged deficiency in compensation paid to her as compared to male Salvation Army officers whose responsibilities were equivalent to those she performed.

The Salvation Army moved to dismiss the complaint for want of jurisdiction in that (1) it was neither an "employer" nor a person engaged in an "industry affecting commerce" within the meaning of §§ 701(b) and (h)[3] of Title VII and (2) since it is a "religious

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ditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

[3]Section 701(b) of Title VII, 42 U.S.C. § 2000e-(b) reads as follows:

"(b) The term 'employer' means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or a State or political subdivision thereof, (2) a bona fide private member-

corporation" for which Mrs. McClure had voluntarily agreed to perform "work connected with the carrying on by such corporation * * * of its religious activities", it was not subject to the provisions of Title VII by reason of §702 thereof.[4] There was also an answer, asserting, inter alia, that since it is a church, application of the provisions of Title VII to The Salvation Army under the circumstances presented by this action would constitute a violation of the First Amendment of the Constitution of the United States.

Mrs. McClure later filed a motion for leave to file an amended and supplemental complaint; to maintain the suit as a class action on behalf of all female officers and all former female officers of The Salvation Army

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ship club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26 * * *."

Section 701(h) of Title VII, 42 U.S.C. § 2000e(h) reads as follows:

"(h) The term 'industry affecting commerce' means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry 'affecting commerce' within the meaning of the Labor-Management Reporting and Disclosure Act of 1959."

[4]Section 702 of Title VII, 42 U.S.C. §2000e-1 reads as follows:

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."

in the United States; and to add The Salvation Army, a religious and charitable organization operating in the United States as four separate corporations, each operating under the corporate name, "The Salvation Army", as a party defendant.

Action on this motion was delayed pending action on The Salvation Army's motion to dismiss for want of jurisdiction.

Upon a hearing on the motion to dismiss (at which both parties presented witnesses) the District Court found that The Salvation Army was a religion[5] and concluded that Mrs. McClure's activities "... were connected with carrying on of the religious activities of The Salvation Army" in accordance with §702 of Title VII. Apparently concluding that such a finding exempted The Salvation Army from liability for the alleged discrimination, the District Court then sustained the motion to dismiss for want of jurisdiction.

On appeal, neither Mrs. McClure nor the EEOC, as *amicus curiae*, question the Salvation Army's status as a religion or her status as a minister engaged in the religious or ecclesiastical activities of the church. However, they contend that the Army is not exempt from the prohibitions of Title VII and is therefore liable for discriminating against Mrs. McClure on the basis

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[5]For court decisions recognizing The Salvation Army's status as a religious organization see Salvation Army v. United States, 138 F.Supp. 914 (S.D., N.Y., 1956); Bennett v. City of LaGrange, 153 Ga. 428 (1922); Hull v. State, 120 Ind. 153, 22 N.E. 117 (1889).

of sex with respect to compensation, terms, conditions or privileges of employment.

The Salvation Army again contends, as it did in the District Court, that it is neither an "employer" nor is Mrs. McClure an "employee" within the definition of those terms as defined by Title VII. Should we disagree with this contention, it then urges that the exemption provided by §702 of Title VII applies to The Salvation Army "with respect to its officers (ordained ministers) performing work connected with The Salvation Army's religious activities". Were we to decide that the exemption provided by §702 is not applicable to the facts as presented by this appeal, The Salvation Army urges that the application of the provisions of Title VII to the relationship between it and its officers (a church and its ministers) is violative of the Religion Clauses of the First Amendment.

I

If the provisions of Title VII are to apply to the relationship between The Salvation Army and Mrs. McClure it is necessary that it be an "employer" engaged in an "industry affecting commerce" and that she be an "employee" as those terms are defined by §701(b) (f) and (h) of the Title.[6]

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[6]Section (f) of Title VII, 42 U.S.C. §2000e (f) reads as follows:
"(f) The term 'employee' means an individual employed by an employer."
See Footnote 3, *supra*.

In addition to not *specifically* excluding religious organizations from the term as defined, the intention of Congress to allow such an organization to qualify as an "employer" is shown by the fact that in subsequent provisions of Title VII, limited and specific exemption from the Title's prohibitions were provided for them. The effect of these provisions is to cause a religious organization qualifying as such to be considered as an "employer", and to eliminate only certain of their employment relations from the prohibitions of Title VII.

That The Salvation Army qualifies as an "employer" engaged in an "industry affecting commerce" is illustrated by the following facts: Employment figures for the Army show approximately 3,000 people located in the several states which comprise the territory which it classifies as "employees", whose gross annual earnings are over $7,000,000 plus an additional 1,330 officers which it classifies as "non-employees"; an interstate activity responsible for administering and expending funds in excess of $147,000,000, managing property holdings worth more than $62,000,000 as of 1969, and deriving an income of $30,000,000 a year, of which $9,000,000 is derived from interest, dividends, sales, and services; a paper, "The War Cry", is printed by the national organization and sold nationwide, which produces income.

The existence of these facts demonstrates that The Salvation Army, though a religious organization not organized to engage in commerce, is nevertheless an "employer" engaged in an "industry affecting com-

merce". Organizations affecting commerce may not escape the coverage of social legislation by showing that they were created for fraternal or religious purposes. *Polish National Alliance of the United States v. NLRB*, 322 U.S. 643, 64 S.Ct. 1196, 88 L.Ed. 1509 (1944); *Mitchell v. Pilgrim Holiness Church Corp.*, 7 Cir., 1954, 210 F.2d 879, cert. denied 347 U.S. 1013, 74 S.Ct. 867, 98 L.Ed. 1136 (1954).[7]

Because Title VII's definition of "employee" is not restrictive, the existence of such a status for a certain individual must turn on the facts of each case.

After filing an application, Mrs. McClure was selected by The Salvation Army as a candidate for officership. She was then trained in all phases of her duties for a period of two years. After her training was completed, she was commissioned as an officer. Her assignments to various positions in the Southern Territory were completely within the control of her superiors. Supervision over the performance of her work was maintained through the direct observance of a superior officer, the use of reports and the audit of certain records that were kept by her. At no time was she allowed to undertake a project without the approval of a superior officer. She was subject at all times to the right of termination retained by The Salvation Army. Her amount of compensation was governed by a national salary schedule set by The Salvation Army,

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[7]The Salvation Army did not seriously question its status as an 'employer' in its brief. However, we feel it is necessary to discuss its status as such.

which also provided her with workmen's compensation insurance.

Thus the record shows that Mrs. McClure was selected, employed, controlled, trained, and paid by The Salvation Army. When the existence of such factors is shown, the individual falls within the definition of "employee". See *Tarboro v. Reading Company*, 3 Cir., 1968, 396 F.2d 941, cert. denied 393 U. S. 1027, 89 S.Ct. 637, 21 L.Ed.2d 569 (1969); *Santa Rosa Island Authority v. F. Rust Smith & Sons, Inc.*, 5 Cir., 1962, 303 F.2d 576.

The Salvation Army's contention that Mrs. McClure is a volunteer because the terms of her application state that she will regard herself as such, ignores the fact that employment contracts cannot be used to waive protections granted to employees by an Act of Congress. See *J. I. Case Company v. NLRB*, 321 U.S. 332, 64 S.Ct. 576, 88 L.Ed. 762 (1944).

We next consider the effect of §702. This section provides certain employment relations with an exemption from the prohibitions of Title VII.

Mrs. McClure and the EEOC contend that the exemption permits a religious organization to discriminate only on the basis of religion. They contend that the section was intended to allow a religious organization to employ persons of a particular faith to perform work connected with the carrying on of their religious activities without otherwise violating the provisions of Title VII. Both the language and the legislative history of the section support this contention. The original House

version of §702 contained in H.R. 7152 provided a religious organization with a blanket exemption from the provisions of Title VII. This version reads as follows:

> "This title shall not apply to an employer with respect to the employment of aliens outside any State or to a religious corporation, association, or society."

This broad exemption for religious organizations proposed by the House was limited by Substitute Senate Amendment No. 656 which ultimately became law. Senator Humphrey, the Majority Leader of the Senate and a principal sponsor of the substitute amendment, explained that the Senate Amendment limited the blanket exemption given to religious organizations:

> "Section 704 formerly Section 703 and later renumbered as Section 702 has been amended to limit the general exemption of religious groups to those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities ..." 110 Cong. Rec. 12818.

The language and the legislative history of §702 compel the conclusion that Congress did not intend that a religious organization be exempted from liability for discriminating against its employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment.

This view necessitates consideration of the constitutional issue.

II

Does the application of the provisions of Title VII to the relationship between The Salvation Army and Mrs. McClure (a church and its minister) violate either of the Religion Clauses of the First Amendment?

The Supreme Court has many times recognized that the First Amendment has built a "wall of separation" between church and State. Though that "wall of separation" between permissible and impermissible intrusion of the State into matters of religion may blur, or become indistinct, or vary, it does and must remain high and impregnable. In *Everson v. Board of Education*, 330 U.S. 1, 67 S.Ct. 504, 91 L.Ed. 711 (1947), it was said, "We could not approve the slightest breach".

Only in rare instances where a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate" is shown can a court uphold state action which imposes even an "incidental burden" on the free exercise of religion. In this highly sensitive constitutional area "'only the gravest abuses, endangering paramount interests, give occasion for permissible limitation'". *Sherbert v. Verner*, 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed. 2d 965 (1963). Restrictions on the free exercise of religion are allowed only when it is necessary "to prevent grave and immediate danger to interests which the State may lawfully pro-

tect". *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943). "[T]he power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom". *Cantwell v. Connecticut*, 310 U.S. 296, 304, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church.

It has long been the practice of The Salvation Army, as with many other religious denominations, to determine these matters which deal with the very terms of a minister's calling. Such a practice must be classified as both basic and traditional.

In *Watson v. Jones*, 80 U.S. 679, 13 Wall. 679 (1871), the Supreme Court began to place matters of church government and administration beyond the purview of civil authorities. In *Watson*, one of two factions struggling for control of church property had been recognized by the highest ecclesiastical body of the Presbyterian Church as the "regular and lawful" governing

body of the church. From a state court's decision that it was bound by the ecclesiastical ruling, the dissident faction appealed. The Supreme Court affirmed, stating:

> "... whenever the questions of discipline, or of faith or ecclesiastical rule, custom, or law have been decided by the highest of these church judicatories to which the matter has been carried, the legal tribunals must accept such decisions as final, and as binding on them, in their application to the case before them." Id. at 727.

Over fifty years later in *Gonzalez v. Roman Catholic Archbishop*, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the petitioner was attempting to challenge a decision by the Archbishop of Manila, who had refused to appoint him to chaplaincy on the ground that, according to the Canon Law then in force, he did not possess the required qualifications. In upholding the Archbishop's interpretation of the Canon Law, the Supreme Court said:

> "* * * In the absence of fraud, collusion or arbitrariness, the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights, are accepted in litigation before the secular courts as conclusive, because the parties in interest have made them so by contract or otherwise. * * *." Id. at 16.

In *Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 73 S.Ct. 143, 97 L.Ed. 120 (1952), the principle announced by *Watson* and *Gonzalez* became a constitutional prohibition. Legislation had been passed which transferred administrative control of Russian Orthodox churches in North America from the Patriarch of Moscow to authorities selected by a convention of the North American churches. This resulted in appointees of the Patriarch of Moscow being denied the use and occupancy of St. Nicholas Cathedral in New York City. Holding the New York law to be an unconstitutional interference with the free exercise of religion, the Supreme Court stated that "legislation that regulates church administration, the operation of the churches [or] the appointment of clergy *** prohibits the free exercise of religion". Id. at 119.

The case was then remanded to the Court of Appeals of the State of New York, which ordered a retrial of the question of the appellee's right to use and occupancy of the cathedral on a common law issue assertedly left open by the Supreme Court's decision in *Kedroff*. The Court of Appeals rendered a decision holding that, under the common law of New York, the Patriarch's appointees were not entitled to exercise the right of use and occupancy granted to them by virtue of Canon Law. The Supreme Court again reversed, holding that constitutional principles prevent *the judiciary, as well as the legislature,* from interfering with the free exercise of religion. *Kreshik v. St. Nicholas Cathedral*, 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed.2d 1140 (1960).

Recently in *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 89 S.Ct. 601, 21 L. Ed.2d 658 (1969), the Supreme Court warned that "* * * First Amendment values are plainly jeopardized when church property litigation is made to turn on the resolution by civil courts of controversies over religious doctrine and practice. If civil courts undertake to resolve such controversies in order to adjudicate the property dispute, the hazards are ever present of inhibiting the free development of religious doctrine and of implicating secular interests in matters of purely ecclesiastical concern. * * *." Id. at 449.

A common thread runs through these opinions, which is best exemplified by those words used by the Supreme Court in commenting on its holding in *Watson v. Jones, supra*. For throughout these opinions there exists "a spirit of freedom for religious organizations, an independence from secular control or manipulation — in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine. * * *." *Kedroff v. St. Nicholas Cathedral, supra*, at 116.

In her complaint, Mrs. McClure has charged that The Salvation Army engages in certain practices with regard to a minister's assignment, his salary, and his duties, which have been declared unlawful by Title VII. However, it would be useless to argue that these decisions are not matters of church administration and government and thus, purely of ecclesiastical cognizance.

An application of the provisions of Title VII to the employment relationship which exists between The Salvation Army and Mrs. McClure, a church and its minister, would involve an investigation and review of these practices and decisions and would, as a result, cause the State to intrude upon matters of church administration and government which have so many times before been proclaimed to be matters of a singular ecclesiastical concern. Control of strictly ecclesiastical matters could easily pass from the church to the State. The church would then be without the power to decide for itself, free from state interference, matters of church administration and government.

Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment. As was said by Justice Clark in *Abington School District v. Schempp*, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed. 2d 844 (1963), "the breach of neutrality that is today a trickling stream may all too soon become a raging torrent * * *".

We find that the application of the provisions of Title VII to the employment relationship existing between the Salvation Army and Mrs. McClure, a church and its minister would result in an encroachment by the State into an area of religious freedom which it is for-

bidden to enter by the principles of the free exercise clause of the First Amendment. Yet, "if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided." *Ashwander v. Tennessee Valley Authority*, 1936, 297 U.S. 288, 346, 80 L.Ed. 688, 56 S.Ct. 466 (concurring opinion of Mr. Justice Brandeis). We therefore hold that Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister. The order of the District Court sustaining The Salvation Army's motion to dismiss the complaint for want of jurisdiction is

AFFIRMED.

Order of the United States District Court Denying Application for a Copy of Transcript

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[CAPTION OMITTED]

On July 15, 1970, the plaintiff, Mrs. Billie B. McClure, an officer of the Salvation Army, filed a Complaint against the Salvation Army, pursuant to Title VII of the 1964 Civil Rights Act. This Complaint was allowed to be filed "in forma pauperis." Subsequent proceedings have been held in the case including an extensive hearing of evidence on November 23, 1970 and November 24, 1970.

Evidence was taken on the jurisdictional questions of defendant's motion to dismiss and the parties were ordered to submit additional arguments and authorities in support or opposition to the motion.

A 260-page transcript has been filed with the Clerk of the Court on December 16, 1970. On December 30, 1970, the attorney for the plaintiff presented to the Court an application for an order directing the court reporter to furnish plaintiff with a copy of the transcript of evidence.

At the hearing, the plaintiff testified that she was no longer an officer or employee of the Salvation Army and that she was now engaged as a school teacher in the public schools of Newton County, Georgia. The Court at that time indicated that the question of further proceedings *in forma pauperis* would be reviewed by the Court.

The plaintiff in supporting her application for a copy of the transcript, filed an affidavit setting forth that she has a net take-home pay as a school teacher of $380 and also has additional employment in an Atlanta department store which nets her approximately $47.00 every two weeks. The affidavit is silent as to the gross pay from either employment, but indicates there are taxes and *other deductions* withheld from the gross. The affidavit further sets forth extensive debts for medical expenses, taxes, furniture, and other debts commonly owed by the head of a household. The affidavit also states that the plaintiff has no real property nor assets other than her household furnishings and personal effects.

The questions presented to the Court are: (1) Assuming that the action is continuing *in forma pauperis,* can the Court direct the court reporter to furnish a transcript without charge or direct the United States to pay for the transcript? (2) Is the plaintiff a pauper and does the Court have the authority to modify its previous order allowing plaintiff to proceed *in forma pauperis.*

On the first question, there appears to be an abundance of authority that a copy of a transcript in a civil action is not to be furnished at government expense. *Estabrook* v. *King* (8th Cir., 1941), 119 F.2d 607. *Cheek* v. *Thompson,* D.C., La., 1940, 33 F.Supp. 497. *Ebenhart* v. *Power,* D.C., N.Y., 1969, 309 F.Supp. 660.

Title 28 U.S.C. §1915 allows the commencement of an action without prepayment of costs and fees or the necessity of giving security therefor. The courts in dealing with this question in a civil action, other than habeas corpus which is provided for by Title 18 U.S.C. §1825, have restricted costs and fees to "the ordinary fees and charges of

officers of the Court." *Cheek* v. *Thompson, supra.* While at the time of the *Cheek* case the court reporter was not an officer created by law and had no salary, the 8th Circuit in *Estabrook* v. *King, supra,* establishes the rule as being unchanged by §723(c) which authorizes the designation of an official court stenographer. The Court there states "the charges of a court reporter were not in their inception 'fees or costs,' within the meaning of" the statute and this Court cannot direct the United States to pay such a charge.

While the Court was justified in its original order allowing this action to be commenced *in forma pauperis* under §1915, the plaintiff's circumstances have so changed as to require in all further proceedings that the plaintiff be treated as any other party. The Court's authority for this action is set forth in *Spears* v. *Continental Bus System, Inc.,* Dallas, Texas, D.C., La., 1957, 148 F.Supp. 806.

For the foregoing reasons, plaintiff's application for an order directing the court reporter to furnish a copy of the transcript of proceedings of November 23 and 24 is hereby denied.

This 13th day of January 1971.

WILLIAM C. O'KELLEY
United States District Judge

Judgment of the United States District Court

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA

[CAPTION OMITTED]

This action came on for consideration before the Court, Honorable William C. O'Kelley, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered, granting defendant's motion to dismiss,

It is Ordered and Adjudged that this action be dismissed, that the plaintiff take nothing, and that the defendant, The Salvation Army, recover of the plaintiff, Mrs. Billie B. McClure, its costs of action.

Dated at Atlanta, Ga., this 12th day of March, 1971.

Filed & entered in Clerk's Office
March 12, 1971
Claude L. Goza, Clerk
By: JAR
Deputy Clerk

CLAUDE L. GOZA
Clerk of Court

By: JERRY RYLEE, Deputy

Order of the United States District Court Denying Application to Proceed *in Forma Pauperis*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

[CAPTION OMITTED]

This application for leave to proceed *in forma pauperis* upon appeal was filed on April 9, 1971 pursuant to and simultaneous with a notice of appeal in the instant action.

Attendant with her application was her affidavit of inability to pay the costs. She has attached a schedule of income and expenses over the period of September 1970 through April 9, 1971. That schedule reflects an income for that 7-8 month span of $3,632.00 with expenses totaling $4,125.28. Proceeding beyond the schedule and the surface impressions obtaining thereto, the Court notes additional and modified figures in the verbage of the affidavit. Petitioner affirms a net monthly income (after taxes and deductions) from teaching, in the amount of $389.00, a net monthly income from Davison's Department Store in the sum of $98.00, receipt of $35.00 per month from a daughter for board, and $52.00 from the daughter for payment on applicant's house trailer. These sums total $583.00 net monthly income. She affirms that her present outstanding indebtedness is approximately $3,000.00. Assuming *arguendo* that her daughter did not contribute the $52.00 monthly payment toward the trailer, petitioner would still have an income of $531.00.

Petitioner has three children. The oldest, David, ostensibly is emancipated and resides in his own quarters. The other son Darryl is dependent on petitioner while the third child, Carla contributes $35.00 while living with petitioner and, according to petitioner's affidavit, plans to add another $52.00 per month. It is noted that many of the debts are non-recurring so that the current indebtedness should not remain static. With an approximate indebtedness of $3,000.00 and one dependent child, the petitioner could not be classed as a pauper when receiving $589.00 per month, notwithstanding the decisions cited by petitioner. See *Harris* v. *Harris,* C.A., D.C., 1970, 424 F.2d 806, *McKelton* v. *Bruno,* C.A., D.C., 1970, 428 F.2d 718 which reflect lower incomes and more dependents.

The Court cannot abide by petitioner's submissions of inability to assume the costs of appeal. While it may impose a hardship, it is no more so under the facts set forth than other litigants endure. Consequently, in accordance with Rule 24, Rules of Appellate Procedure, the Court declines to grant petitioner's application for leave to proceed *in forma pauperis* upon appeal.

IT IS SO ORDERED this 11 day of May, 1971.

WILLIAM C. O'KELLEY
United States District Judge

Judgment of the United States Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

OCTOBER TERM, 1971

No. 71-2270

D. C. Docket No. CA-13995

MRS. BILLIE B. McCLURE,

Plaintiff-Appellant,

versus

THE SALVATION ARMY,

Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before:

WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said

District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

March 17, 1972

Issued as Mandate: May 4, 1972

Order of the United States Court of Appeals Ruling on Petition for Rehearing

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

[CAPTION OMITTED]

(April 26, 1972)

ON PETITION FOR REHEARING

Before:

WISDOM, COLEMAN and SIMPSON,
Circuit Judges.

PER CURIAM: It is ORDERED that the parties bear their own costs in this Court and in the district court.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Case No. 72-134

MRS. BILLIE MCCLURE,
Plaintiff-Petitioner,

v.

THE SALVATION ARMY,
Defendant-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT IN OPPOSITION

Citations to Opinions Below

The Opinion (Petition Appendix A 1a-8a, hereafter referred to as "Pet. App. A") by the United States District Court for the Northern District of Georgia dismissing the complaint on jurisdictional grounds is reported at 323 F.Supp. 1100 (N. D. Ga. 1971). The opinion (Pet. App. A 9a-25a) of the United States Court of Appeals for the Fifth Circuit, affirming the judgment (Pet. App. A 29a) of the District Court, is not yet reported. The order (Pet. App. A 26a-28a) of the District Court, dated January 13, 1971, denying Petitioner's application for a free transcript is re-

ported at 51 F. R. D. 215 (N. D. Ga. 1971). The order (Pet. App. A 30a-31a) of the District Court, dated May 11, 1971, denying Petitioner's application to proceed *in forma pauperis,* was appealed to the Court of Appeals. The order of the Court of Appeals, filed June 28, 1971, denying the application, but allowing Petitioner to proceed on appeal on the original typewritten record and typewritten briefs, is attached hereto as Respondent's Appendix "A".

Jurisdiction

Respondent strongly contends that this Court is without authority to grant a writ of certiorari in the instant case since the untimely filing of the petition deprives the Court of jurisdiction under the statutory requirements of 28 *U.S.C.* §§ 1254 (1) and 2101 (c). The original opinion and judgment (Pet. App. A 32a-33a) of the Court of Appeals was filed on March 17, 1972. Under the provisions of 28 *U.S.C.* § 2101 (c), a writ of certiorari has to be "taken or applied for within ninety days after the entry of such judgment or decree," which in the instant case would have fallen on June 15, 1972. The petition for a writ of certiorari was actually docketed in this Court on July 24, 1972, as shown by the Notice of Petition for Writ of Certiorari attached hereto as Respondent's Appendix "B", thirty-nine (39) days after the expiration of the statutory deadline. No application for an extension of time within which to file the petition for writ of certiorari was made by Petitioner under 28 *U.S.C.* § 2101 (c) and Rule 22 (4) of this Court. Where, as here, the time for filing a petition is established by an act of Congress rather than a rule of this Court, such an untimely filing has consistently been held to be a jurisdictional defect, making it impossible for this Court to waive the untimeliness or to entertain the petition. As stated in *Department of Banking* v. *Pink,* 317 U.S. 264, 268, 63 S. Ct.

233, 87 L. Ed. 254 (1942), such a petition "must . . . be denied for want of jurisdiction". See also *Teague* v. *Commissioner of Customs,* 404 F.2d 441 (2d Cir. 1968), cert. den., 394 U.S. 977, 89 S. Ct. 1457, 22 L.Ed. 756 (1969). In *Schact* v. *United States,* 398 U.S. 58, 63-65, 90 S. Ct. 1555, 26 L.Ed. 2d 44 (1970), this Court recently indicated that a waiver of untimeliness can be made only where a rule of this Court, rather than a statute, establishes the time requirement. The Court has strictly followed the statutory limits of 28 *U.S.C.* §2101 (c). See *Deal* v. *Cincinnati Board of Education,* 402 U.S. 962, 91 S. Ct. 1630, 29 L. Ed. 2d 128 (1971).

Petitioner will undoubtedly argue that her filing of a petition for re-hearing with the Court of Appeals below tolled the ninety-day limitation period set forth in 28 *U.S.C.* §2101 (c). Petitioner did file a petition for re-hearing, which is attached hereto as Respondent's Appendix "C", with the Fifth Circuit on March 28, 1972, but this petition for re-hearing was specifically limited to a request that the Fifth Circuit ". . . amend its judgment to provide for reversal of so much of the judgment of the District Court as assesses costs against the Appellant-Plaintiff." A supplement to the petition for re-hearing, which is attached hereto as Respondent's Appendix "D", was filed on April 6, 1972, in which Petitioner again sought *only relief* pertaining to court costs and the payment of docket fees and transcript costs. The April 26, 1972 order (Pet. App. A 34a) entered by the Court of Appeals in no way affected any matter of substance contained in its opinion and judgment dated March 17, 1972, which opinion analyzed in great depth the provisions of Title VII of the Civil Rights Act of 1964 (42 *U.S.C.* §§ 2000e-2000e-15) and the Religion Clauses of the First Amendment. In this regard, it is clear that the filing of the petition for re-hearing with the Fifth Circuit did not constitute an extension of the timeliness requirement. In *Fed. Trade Comm.* v. *Minneapolis-Honeywell*

Regulator Co., 344 U.S. 206, 211-12, 73 S. Ct. 245, 97 L. Ed. 245 (1952), this Court has stated that ". . . the mere fact that a judgment previously entered has been re-entered or revised in an immaterial way does not toll the time within which review must be sought." The Court of Appeals in issuing its April 26, 1972 order on the petition for re-hearing did not amend or change any material ruling or any matters of substance contained in its original March 17, 1972 opinion which would in any way toll the ninety day requirement of 28 *U.S.C.* § 2101 (c). See 9 Moore's *Fed. Practice* ¶ 201.03 [2-2] p. 513 (2d Ed. 1970); 32 *Am. Jur.* 2d "Federal Practice and Procedure" § 285, p. 751 n.3 (1967). Respondent therefore respectfully submits that the petition for writ of certiorari was not filed in a timely manner in order to grant jurisdiction to this Court, and that this Court should not entertain the petition. Respondent alternatively submits that the petition for re-hearing filed with the Court of Appeals preserved for consideration by this Court only those issues raised in such petition for re-hearing, which issues of *in forma pauperis* status, the providing of a free transcript, and court costs clearly do not justify the granting of a writ by this Court, as discussed more fully in the Argument portion of this Brief.

Questions Presented

The Statement of Questions Presented as enumerated in the petition contains unnecessary and confusing detail. Respondent submits the following questions as a more accurate listing of the issues now before this Court.

I. Does the application of the provisions of Title VII of the Civil Rights Act of 1964 to the relationship between The Salvation Army and Mrs. McClure (a church and its

minister) violate either of the Religion Clauses of the First Amendment?

II. Was the Court of Appeals correct in interpreting Title VII of the Civil Rights Act of 1964 in a manner which upheld its constitutionality?

III. Do Mrs. McClure's claims concerning her *in forma pauperis* status, her demands for a free transcript and her contentions concerning court costs—the only issues raised in the petition for re-hearing in the Court of Appeals—justify the granting of a writ in the instant case?

Constitutional Provisions and Statutes Involved

The First Amendment of the Constitution of the United States provides as follows:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

28 *U.S.C.* § 2101(c)

> "(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

28 *U.S.C.* § 1254(1)

> "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
>
> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

Provisions of Title VII of the Civil Rights Act of 1964 are set forth in the Petition and will not be repeated herein.

Statement of the Case

This case involves a dispute between a church and its minister.

As found by both the Court of Appeals and the District Court, The Salvation Army is a church and Mrs. Billie B. McClure is one of its ordained ministers (Pet.App.A 4a-5a, 9a). The Salvation Army was founded in 1865 in the East End of London by the founders, William and Catherine Booth (Court of Appeals Record, p. 72, hereafter referred to as "R. ——"). It is one of two non-sacramental churches holding membership in the World Council of Churches, the other being the Society of Friends (R. 73). It is located in seventy-one countries, including the countries of Western Europe, the Caribbean and Canada[1] (R. 72). The Army has its own doctrine, setting forth its creed and beliefs, contained in The Salvation Army Handbook of Doctrine (Defendant's Exh. 8; R. 76-7); it has four major ceremonies: the swearing-in of soldiers, marriage, burial, and dedication of children (R. 73). Religious services are held on Sundays and other days and they have all the elements of the Christian witness service, including a preaching part, congregational singing, scripture reading, prayer, and an invitation to the unsaved (R. 78-9).

The Army, which is organized and operated on a military pattern, is principally composed of "officers," "soldiers," and "employees." The distinction between these categories was recognized by the District Court in its findings of fact (Pet.

1. The Army is an international religion with over 1,500,000 active members (soldiers) and 18,000 active officers (ministers) throughout the world. The National Headquarters of The Salvation Army in the United States is the ecclesiastical headquarters and is charged with the supervision and coordination of all the activities of The Salvation Army in the United States. Under the National Headquarters, The Salvation Army in the United States is organized on the basis of four Territories, one of which, the Southern Territory, a Georgia corporation, is the Respondent herein.

App.A 2a-3a). The Salvation Army "officer" is equivalent to the clergy of another church, while the "soldier" is equated with the laity (Pet.App.A 3a; R. 73). In contrast to these categories are the "employees"[2], ranging from doctors to laborers, who bring needed skills to the Army, but who are never commissioned officers of the Army (Pet.App. A 3a; R. 34-5, 75).

There are approximately 1300 officers serving in The Southern Territory. An officer is one who has first received a divine call from God and has been accepted and trained and commissioned as a Salvation Army officer. Being commissioned in The Salvation Army is the equivalent to ordination. Officers of The Salvation Army are not permitted to have any outside employment whatever. Training of the officer consists of a two-year session of training. The officer performs the four major ceremonies of the Army, which are the swearing-in of soldiers, performing marriages, burials, and dedication of children. Salvation Army officers have served as chaplains in World War I, World War II and in Viet Nam (Pet. App. A 2a).

Mrs. McClure entered The Salvation Army Officers' Training School in September, 1965 (R. 37). She was first sent by the Army in June, 1966 to serve as a Cadet Lieutenant at Camp Hoblitzele in Texas (R. 37). In August of 1966 she was assigned to Little Rock, Arkansas as Commanding Officer of the Little Rock Citadel Corps. She served in Little Rock from August 1966 to May 1967. She was next assigned as Commanding Officer of the corps at Pascagoula, Mississippi, from June 1967 to January 1968 (R. 44). Mrs. McClure requested in September of 1967 that she be relieved from corps work because she did not feel that she could handle all the work that had to be conducted and also give proper time to the rearing of her chil-

2. There are approximately 3,000 "employees" of the Army, for instance, in the Southern Territory (R. 74).

dren (McClure Dep. p. 88). The Army granted her request and she next served as a case work supervisor in the Georgia Division in Atlanta, Georgia from February 1, 1968 through October, 1969. Her final assignment in The Salvation Army was as a secretary in the Public Relations Department of the Southern Territorial Headquarters (Pet. App. A 4a). The District Court found that Mrs. McClure was serving as an ordained minister throughout her officership, including her final assignment in the Public Relations Department (Pet. App. A 4a-5a). Mrs. McClure considered herself as performing a religious function for The Salvation Army, even while sitting behind a typewriter and typing a letter (Pet. App. A 5a).

Mrs. McClure filed her complaint in the instant case on July 15, 1970 with the United States District Court, Northern District of Georgia, Atlanta Division, under Title VII of the Civil Rights Act of 1964, alleging that The Salvation Army had violated her rights under Title VII. The Salvation Army filed a motion to dismiss the complaint for want of jurisdiction on July 29, 1970 (R. 337-370), and its answer on August 4, 1970 (R. 373-381). In addition to specifically denying Mrs. McClure's allegations of discrimination, The Salvation Army asserted in its pleadings, among other defenses, that Mrs. McClure was not an "employee" within the meaning of Title VII, as defined by 42 *U.S.C.* § 2000e (f) (R. 378), that Mrs. McClure had failed to exhaust her administrative remedies and final rights of appeal and review with The Salvation Army (R. 378), and that defendant was an established church with its own ecclesiastical policies, government and discipline so that application of the provisions of Title VII would constitute a violation of First Amendment rights (R. 379). After a two-day evidentiary hearing on the motion to dismiss the complaint for want of jurisdiction, held on November 23 and 24, 1970, the District Court entered an opinion, dated March 18, 1971 (Pet. App. A 1a-8a; R. 572-584), granting the motion to dismiss the

complaint for want of jurisdiction, and then issued judgment in favor of The Salvation Army (Pet. App. A 29a). The District Court emphasized throughout that it would only consider matters presented at the evidentiary hearing in ruling on the motion to dismiss (R. 11, 181-2, 241-6), and carefully excluded from evidence all testimony or evidence in any way pertaining to the merits of the claims set forth in Mrs. McClure's complaint[3] (R. 177-9, 190-1, 193). The findings of fact made by the District Court were not disputed by Mrs. McClure before the Court of Appeals.[4] After oral argument and careful consideration of extensive briefs,[5] the Court of Appeals affirmed (Pet. App. A 9a-25a) on considerably broader grounds the judgment of the District Court. Both the opinion and judgment (Pet. App.

3. Although the findings of fact made by the District Court are comprehensively set forth in its opinion (Pet. App. A 2a-5a), petitioner's counsel, by reference to depositions and other material not considered by the District Court in the evidentiary hearing, has attempted to raise questions concerning the merits of Mrs. McClure's charges, particularly in regard to alleged retaliation by the Army. It is sufficient to note that The Salvation Army has maintained throughout the proceedings below that it has not discriminated against Mrs. McClure in any manner whatever, and that the same non-evidentiary references cited in the petition reveal a history of respondent's disappointment and dissatisfaction with Mrs. McClure's performance as a minister of the Gospel arising long before her filing of charges with the Equal Employment Opportunity Commission, and as determined by a Court of Reference (an ecclesiastical court) resulting in her dismissal from officership in the Army and from which determination she did not appeal.

4. Indeed, Mrs. McClure prefaced her Statement of Facts in her brief to the Court of Appeals with the following statement, followed by a verbatim recital of the District Court's findings of fact:

> "From the evidence adduced at the hearing, the Court made the following findings, which for the purpose of this appeal are not in contention." (Brief of Plaintiff-Appellant in the Court of Appeals, p. 2)

5. Including a brief of The United States Equal Employment Opportunity Commission filed as *amicus curiae* in support of Mrs. McClure's position. The Equal Employment Opportunity Commission also appeared and presented oral argument to the Court of Appeals.

A 32a-33a) of the Court of Appeals were entered on March 17, 1972. As previously noted, Mrs. McClure filed a limited petition for re-hearing with the Court of Appeals, which resulted in a minor reallocation of court costs (Pet. App. A 34a).

Argument

The decision of the Fifth Circuit is obviously correct and contains no basis for review by this Court.

Even apart from the untimeliness of the petition, no reason is apparent for the review of the decision below.

I.

It is undisputed by the parties that The Salvation Army is an established religion.[6] Both the District Court and the Court of Appeals specifically found that Mrs. McClure was a minister of the Gospel and an ordained minister of The Salvation Army (Pet. App. A 4a, 9a). The instant case thus involves a question at the very heart of all religions —the right of the religious organization to select, retain, and discipline its own clergy. The petition filed with this Court has attempted to enlarge and confuse the precise holding made by the Court of Appeals, which was expressly limited ". . . to the church-minister relationship" and expressly refrained ". . . from any decision as to other church employees of a type not involved in this controversy . . ." (Pet. App. A 10a). Neither Mrs. McClure's hypotheticals concerning "part-time ministers" and "churches all of

6. The Army's status as a religious organization has been recognized in numerous decisions. *Salvation Army* v. *United States*, 138 F.Supp. 914 (S. D. N. Y. 1956); *Bennett* v. *City of LaGrange*, 153 Ga. 428 (1922); *Hull* v. *State*, 120 Ind. 153, 22 N. E. 117 (1889). See *Prince* v. *Massachusetts*, 321 U.S. 158, 174, 64 S. Ct. 438, 88 L. Ed. 645 (1943) (Judge Murray's dissent), recognizing ". . . The Salvation Army and others who practice religion . . ."

whose members regard themselves as ministers," nor her contentions concerning the Army's "employees," are relevant or helpful in evaluating the principal issue before this Court—whether the State can, directly or indirectly, interfere and supervise the Church in the selection and discipline of clergy. The importance of the church-minister relationship was properly emphasized by the Court of Appeals in its opinion:

> "The relationship between an organized church and its ministers is its lifeblood. The minister is the chief instrument by which the church seeks to fulfill its purpose. Matters touching this relationship must necessarily be recognized as of prime ecclesiastical concern. Just as the initial function of selecting a minister is a matter of church administration and government, so are the functions which accompany such a selection. It is unavoidably true that these include the determination of a minister's salary, his place of assignment, and the duty he is to perform in the furtherance of the religious mission of the church. It has long been a practice of The Salvation Army, as with many other religious denominations, to determine these matters which deal with the very terms of a minister's calling. Such a practice must be classified as both basic and traditional" (Pet. App. A 20a).

The Court of Appeals noted the long established and continuing recognition by this Court of the "wall of separation" between Church and State. As stated by Mr. Justice Black in *Everson* v. *Board of Education*, 330 U.S. 1, 18, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

> "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We cannot approve the slightest breach."

The First Amendment protection providing freedom of religion is in a preferred position. *Follett* v. *Town of McCormick, S. C.*, 321 U.S. 573, 64 S.C. 717, 88 L.Ed. 938 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943). Only the gravest abuses endangering paramount interests give occasion for any permissible limitation. *Sherbert* v. *Verner,* 374 U.S. 398, 406, 83 S.C. 1790, 10 L.Ed. 2d 965 (1963); *Thomas* v. *Collins,* 323 U.S. 516, 530-1, 65 S.C. 315, 89 L.Ed. 430 (1945).

The petition cites numerous cases which do not involve questions of ecclesiastical government, administration and discipline. The Court of Appeals recognized that Mrs. McClure's relationship with The Salvation Army was properly one of church control:

> "In her complaint, Mrs. McClure has charged that The Salvation Army engages in certain practices with regard to a minister's assignment, his salary, and his duties, which have been declared unlawful by Title VII. However, it would be useless to argue that these decisions are not matters of church administration and government and thus, purely of ecclesiastical cognizance" (Pet. App. A 23a).

This Court, as traced through a series of opinions discussed by the Court of Appeals, has consistently refused to examine church decisions involving discipline, faith or ecclesiastical rule. The early decision of *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679, 20 L.Ed. 666 (1871) held that such decisions are final and binding upon civil courts. The *Watson* case involved a struggle for control of church property between two factions. One of the factions had been recognized as the proper governing authority by the highest approved ecclesiastical body of the Presbyterian Church. The state court decided that it was bound by the ecclesiastical ruling, and this Court, on appeal, affirmed, pointing out the danger of judicial monitoring of church ecclesiastical decisions:

"But it is a very different thing where a subject-matter of dispute, strictly and purely ecclesiastical in its character,—a matter over which the civil courts exercise no jurisdiction,—a matter which concerns theological controversy, church discipline, ecclesiastical government, or the conformity of the members of the church to the standards of morals required of them, become the subject of its action . . . But it is easy to see that if the civil courts are to inquire into all these matters, the whole subject of doctrinal theology, the usages and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined in the civil court. This principle would deprive these bodies of the right of construing their own church laws . . . and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions." At 80 U.S. (13 Wall.) 733-4.

This Court has taken a consistent position of non-interference in disputes involving a minister and the church. In *Gonzales* v. *Roman Catholic Archbishops of Manila*, 280 U.S. 1, 50 S.Ct. 5, 74 L.Ed. 131 (1929), the petitioner attempted to challenge a refusal by the Archbishops of Manila to appoint him to a chaplaincy. This refusal was based upon petitioner's inability to meet required ecclesiastical qualifications. This refusal was upheld by this Court:

"Because the appointment is a canonical act, *it is the function of the church authorities to determine what the essential qualifications of the chaplain are and whether the candidate possesses them.* In the absence of fraud, collusion, or arbitrariness, *the decisions of the proper church tribunals on matters purely ecclesiastical, although affecting civil rights,*

> *are accepted in litigation before the secular courts as conclusive,* because the parties in interest made them so by contract or otherwise." (Footnote omitted and emphasis supplied) At 280 U.S. 16.

This Court subsequently placed constitutional protections around the selection of clergy in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116, 73 S.Ct. 143, 97 L.Ed. 120 (1952), where Mr. Justice Reed, writing for the Court, stated as follows: "Freedom to select the clergy, where no improper methods of choice are proven, we think, must now be said to have federal constitutional protection as a part of the free exercise of religion against State interference." (Footnote omitted.) This holding invalidating legislative action was subsequently extended to judicial action in *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190, 80 S.Ct. 1037, 4 L.Ed. 2d 1140 (1960).

The Court of Appeals in its opinion noted the recent decision of this Court in *Presbyterian Ch.* v. *Mary E. B. Hull Mem.,* 393 U.S. 440, 89 S.Ct. 601, 21 L.Ed. 2d 658 (1969), forbidding the interpretation of church doctrine by the judiciary. The case involved a church property dispute which arose when two local churches withdrew from the general church organization. The Georgia Supreme Court rendered judgment for the plaintiff, based upon its interpretation that the national church had departed from its basic tenets of faith and practice existing at the time of the local churches' affiliation. This Court reversed that decision, stating as follows, at 393 U.S. 449-450:

> "The Georgia courts have violated the command of the First Amendment. The departure from doctrine element of the implied trust theory which they applied requires the civil judiciary to determine whether actions of the general church constitute such a 'substantial departure' from the tenets of

> faith and practice existing at the time of the local churches' affiliation that the trust in favor of the general church must be declared to have terminated. This determination has two parts. The civil court must first decide whether the challenged actions of the general church departs substantially from prior doctrine. In reaching such a decision, the court must of necessity make its own interpretation of the meaning of church doctrines. If the court should decide that a substantial departure has occurred, it must then go on to determine whether the issue on which the general church has departed holds a place of such importance in the traditional theology as to require that the trust be terminated. A civil court can make this determination only after assessing the relative significance to the religion of the tenets from which departure was found. *Thus, the departure-from-doctrine element of the Georgia implied trust theory requires the civil court to determine matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion. Plainly, the First Amendment forbids civil courts from playing such a role.*" (Emphasis added).

Mrs. McClure's petition to this Court seeks that very same judicial examination of church doctrine which the Court forbade in the *Mary E. B. Hull Mem.* decision, namely: whether the Army's action in regard to Mrs. McClure violates its doctrine on "The Position of Women"[7]; what interpretation should be given by the Court to "The Position of Women"; and what importance "The Position of Women" plays in the traditional theology of The Salvation Army. Moreover, the Court of Appeals recognized in its opinion that such an examination of church doctrine, re-

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7. As noted by the Petitioner, the Army recognized the equality of women long before the enactment of Title VII in 1964. The Army has indeed "historically bestowed high rank" on women (Pet. p. 15 n. 7), including the Army's highest rank.

gardless of whether conducted through investigation by the Equal Employment Opportunity Commission or through review by judicial bodies, would hopelessly entangle church and State in a manner never contemplated by either this Court or this nation's founders, as follows:

> "Moreover, in addition to injecting the State into substantive ecclesiastical matters, an investigation and review of such matters of church administration and government as a minister's salary, his place of assignment and his duty, which involve a person at the heart of any religious organization, could only produce by its coercive effect the very opposite of that separation of church and State contemplated by the First Amendment," (Pet.App.A 24a).

The Court of Appeals, in refusing to sanction governmental monitoring of church activities, appeared to follow the "entanglement doctrine" as outlined by this Court in a series of decisions in recent years. It has been described as an "independent measure of constitutionality under the Religion Clauses." *Tilton* v. *Richardson,* 403 U.S. 672, 685, 91 S.Ct. 2091, 29 L.Ed. 2d 790 (1971). This doctrine appears to have originated in the decision of *Walz* v. *Tax Commission,* 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970), involving New York law granting property tax exemption to religious organizations. The appellant contended that the exemption indirectly required him to make a contribution to religious bodies and thereby violated the establishment clause of the First Amendment. This Court, after examining the property tax exemption and finding that its legislative purpose neither advanced nor inhibited religion, went further and noted that "We must also be sure that the end results—the effect—is not an *excessive government entanglement with religion.*" *Id.* at 674 [Emphasis added]. This Court then upheld the validity of the property exemption on the ground that it created only a "minimal

and remote involvement between church and state." *Id.* at 676. This Court has subsequently used or made reference to the "entanglement doctrine" in a series of important First Amendment cases. *Lemon* v. *Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105 (1971): *Tilton* v. *Richardson, supra; Gillette* v. *United States,* 401 U.S. 437, 450, 91 S.Ct. 828, 28 L.Ed.2d 168 (1971).

It is to be noted that the governmental supervision discussed in those cases is mere child's play compared to the aggressive investigations which the Equal Employment Opportunity Commission could mount in evaluating the church-minister relationship of all churches. The Commission has already subpoenaed The Salvation Army's personnel and financial records, and has spent countless hours interrogating Army officials concerning the Army's personnel policies with respect to its officers. Should Title VII be held applicable to the church-minister relationship, then the Commission is empowered ". . . to copy any evidence of any person being investigated or proceeded against that relates to unlawful employment practices . . .," 42 *U.S.C.* § 2000e-8(a), to examine witnesses under oath, and ". . . to require the production of documentary evidence relevant or material to the charge under investigation." 42 *U.S.C.* § 2000e-9(a). The Equal Employment Opportunity Act of 1972, Pub.L.No. 92-261, 92d Cong. (March 24, 1972), also broadened Commission powers under § 706 of Title VII by authorizing it to initiate civil actions against non-government respondents. Nor would the Commission be limited simply to the question of salaries in its investigations and actions, since Title VII pertains not only to "compensation" but also to "terms, conditions, or privileges of employment." 42 *U.S.C.* § 2000e-2(a)(1). Since every matter of ecclesiastical discipline can arguably involve a question of sex discrimination, it is foreseeable that every change in status of a Salvation Army officer could be considered by the Commission as a basis for

investigation, surveillance, and court proceedings. There can be no clearer infringement on religious liberty than governmental control and supervision over a church's selection and discipline of its clergy.

II.

The Court of Appeals, in correctly deciding that application of Title VII to the church-minister relationship would violate First Amendment prohibitions, carefully construed Title VII in a manner supporting the constitutionality of the legislation, citing *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 346, 56 S.Ct. 466, 80 L.Ed. 688 (1936). The petition strenuously argues that the Court of Appeals misapplied the *Ashwander* case, but it is apparent that the Court of Appeals merely construed Title VII in a manner giving it the greatest chance of surviving the test of constitutionality. *Ex parte Mitsuye Endo,* 323 U.S. 283, 299, 65 S.Ct. 208, 89 L.Ed. 243 (1945); *Suggs* v. *Hendrix,* 142 F.2d 740, 743 (5th Cir. 1944).

There is nothing in the legislative history of Title VII to suggest that Congress intended to cover ministers within its coverage. An almost identical situation was presented in the case of *Rector of Holy Trinity Church* v. *United States,* 143 U.S. 457, 12 S.Ct. 511, 36 L.Ed. 226 (1892), involving the application and construction of the Alien Contract Labor Law, which prohibited the prepayment of transportation by "any person, company, partnership or corporation, in any manner whatsoever," to assist and encourage the importation or migration of aliens to perform labor or services of any kind in the United States. Plaintiff in error, a religious society incorporated under the laws of New York, had contracted with a rector, an alien residing in England, to enter into service as pastor

in the City of New York. The lower court held the legislation applicable to the hiring of the minister, noting that there was a specific section making certain exceptions to the statute, including professional actors, artists, lecturers, singers and domestic servants, and that there was no specific exception applicable to rectors and pastors. Justice Brewer, delivering the opinion of this Court, first stated, at 143 U.S. 459, that ". . . [A] thing may be in the letter of the statute and yet not fall with the statute, because not within its spirit nor within the intention of its makers." After discussing the legislative history and purpose of the statute, Mr. Justice Brewer concluded that the Congress did not intend to make it a misdemeanor for a church to contract for the services of a Christian minister residing in another nation. The following excerpt from that opinion, at 143 U.S. 471-2, is equally applicable to the instant case:

> "It [the Alien Contract Labor Law] is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil; and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm cannot have been intentionally legislated against. It is the duty of the courts, under these circumstances, to say that, however broad the language of statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute."

Respondent respectfully submits that the Court of Appeals was clearly correct in refusing to apply the provisions of Title VII to the relationship between a church and its minister and in applying a construction to the statute which would preserve its constitutionality.

III.

Petitioner's argument concerning her *in forma pauperis* status, the providing of a free transcript, and the question of court costs in the District Court and in the Court of Appeals obviously do not justify the granting of a writ by this Court. The present emphasis placed by Mrs. McClure on these subjects is in sharp contrast to her position in the Court of Appeals, where she did not even present them for argument in her original brief.[8] The importance of these topics only surfaced on appeal upon the filing by Mrs. McClure of her petition for re-hearing with the Court of Appeals. Since there are serious jurisdictional problems with the present petition, which can only be resolved by making the question of court costs a "substantive" issue, revived interest in the question is understandable. It is also noteworthy that Petitioner has not elected to proceed *in forma pauperis* under Rule 53 of this Court.

Mrs. McClure's financial status was thoroughly considered by the District Court both in rejecting her application for a transcript (Pet. App. A 26a-29a) and her application to proceed *in forma pauperis* (Pet. App. A 30a-31a). Mrs. McClure did not appeal the January 13, 1971 District Court order denying her application for a copy of transcript. She did appeal the May 11, 1971 order denying her application to proceed on appeal *in forma pauperis* (Pet. App. A 30a). This appeal was denied by the Court of Appeals, but Mrs. McClure was allowed to proceed on the original typewritten record and typewritten briefs (Respondent's App. "A"). The Respondent submits that both courts below have minutely examined Mrs. McClure's financial status and have fashioned a division of costs which

8. The matter was argued by the Equal Employment Opportunity Commission in its *amicus curiae* brief.

was exceedingly fair to her. Respondent submits that Petitioner's contentions in this area clearly do not warrant the granting of a writ of certiorari.

Conclusion

For the foregoing reasons, Respondent respectfully submits that the petition for certiorari should be denied.

Harry V. Lamon, Jr.

Jefferson D. Kirby, III

Attorneys for Respondent
The Salvation Army

Of Counsel:

HANSELL, POST, BRANDON & DORSEY
3300 First National Bank Tower
Atlanta, Georgia 30303

Proof of Service

I, Michael J. Hoops, a member of the firm of Appeal Printing Co., Inc., printers for the Respondent The Salvation Army, depose and say that on the 19th day of August, 1972, I served a copy of the foregoing Brief of Respondent in Opposition on the Petitioner, Mrs. Billie McClure, by mailing three copies of said Brief in a duly addressed envelope, with first class postage pre-paid, to her attorney, Marvin M. Karpatkin, Esq., Karpatkin, Ohrenstein & Karpatkin, 1345 Avenue of the Americas, New York, New York 10019, and by mailing three copies, in a duly addressed envelope, with air mail postage pre-paid, to William R. King, Esq., and Edward L. Greenblatt, Esq., Haas, Holland, Levison & Gibert, 2709 First National Bank Tower, Atlanta, Georgia 30303.

All parties required to be served have been served.

Michael J. Hoops

MICHAEL J. HOOPS

Michael J. Hoops

Subscribed and sworn to
before me at New York,
New York, this 19th day
of August, 1972.

JOHN E. BUELL

Notary Public

JOHN E. BUELL
Notary Public, State of New York
No. 31-0484300
Qualified in New York County
Cert. filed with N. Y. County Register
Commission Expires March 30, 1973

Proof of Service

APPENDIX "A"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS

FILED

Jun 28 1971

EDWARD W. WADSWORTH
Clerk

Misc. No. 2104

MRS. BILLIE B. McCLURE

Petitioner,

versus

THE SALVATION ARMY

Respondent.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ORDER:

IT IS ORDERED that the petitioner's motion for leave to appeal in forma pauperis, filed in the above styled and numbered cause, is hereby DENIED.

IT IS FURTHER ORDERED that petitioner be allowed to proceed on the original typewritten record and typewritten briefs.

MARVIN THORNBERRY

United States Circuit Judge

APPENDIX "B"

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE B. McCLURE,
Appellant-Petitioner,

vs.

THE SALVATION ARMY
Appellee-Respondent.

To HANSELL, POST, BRANDON & DORSEY, Counsel for Appellee-Respondent:

YOU ARE HEREBY NOTIFIED that—a petition for a writ of certiorari—in the above-entitled and numbered case was docketed in the Supreme Court of the United States on the 24th day of July, 1972.

At the request of the Clerk of the Supreme Court, we are sending attached hereto an appearance form to be filed by you, or other counsel who will represent your party, with the Clerk at or before the time you file your response to our petition or jurisdictional statement.

MARVIN M. KARPATKIN
Counsel for Appellant-Petitioner
1345 Avenue of the Americas
New York, New York 10019

NOTE: Please indicate whether the case is an appeal or a petition for certiorari by crossing out the inapplicable terms. A copy of this notice need *not* be filed in the Supreme Court.

APPENDIX "C"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. MCCLURE,
Plaintiff-Appellant,

versus

THE SALVATION ARMY,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Petition For Re-Hearing

WILLIAM R. KING
EDWARD L. GREENBLATT
2709 First National Bank Tower
Atlanta, Georgia 30303
Area 404: 525-6141
Attorneys for Appellant

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure, the Appellant respectfully petitions this honorable Court for a re-hearing of the appeal in the above-entitled cause, and in support of this petition represents to the Court as follows:

The judgment of the court below not only dismissed the complaint, but also assessed costs against the Appellant-Plaintiff. This Court affirmed that judgment. The decision does not address itself to this matter and, for the reasons set forth hereinbelow, the Appellant concludes that such result was not intended by this Court, but was occasioned through oversight or inadvertence.

This Court is well aware that the statutory scheme for enforcement of Title VII of the Civil Rights Act of 1964 provides for institution of a civil action in the district court after the Equal Employment Opportunity Commission has been given an opportunity to investigate and attempt to conciliate the alleged discriminatory employment practices. When the aggrieved individual avails himself of that procedure and institutes such action, he is said to be acting as a "private attorney general." If the avowed policy of Title VII of the Civil Rights Act is to be achieved, it is absolutely necessary that such persons be free to avail themselves of the provisions of that Title, including resort to a civil action without running the risk of incurring court costs which, to the usual Appellant-Plaintiff in such cases, is frequently prohibitive.[1] The Congress recognized the discouraging effect assessment of court costs could have upon prospective plaintiffs and authorized commencement of the action without fees, costs or security. 42 U.S.C. §2000e-5(e).

1. Mrs. McClure's motion for leave to proceed on appeal in forma pauperis shows her precarious financial condition. In view of her financial predicament, the requirement that she bear the costs of this action borders on the punitive.

Unless a suit seeking redress of rights protected by Title VII is frivolous or brought in bad faith, its prosecution without payment of costs is always in the public interest. As this Court's opinion demonstrates, this was not an insubstantial case. It required first impression construction of certain provisions of Title VII and application of subtle constitutional principles of church-state separation. The basis for this Court's resolution of the appeal was by way of a judicially created construction that the Congress never intended the Act to apply to employment relationships between a church and its ministers. Surely the Appellant-Plaintiff should not be penalized for having raised questions of such obvious substance, resolution of which benefit the public at large by judicial refinement of Title VII.

For these reasons, Appellant concludes that the Court must have overlooked the fact that its judgment upheld the District Court's assessment of costs against the Appellant-Plaintiff—a decision obviously contrary to the policy of Title VII. Appellant calls this matter to the attention of the Court and asks that the Court amend its judgment to provide for reversal of so much of the judgment of the District Court as assesses costs against the Appellant-Plaintiff.

Appellant's silence with regard to the other aspects of the Court's judgment should not be construed as indicating agreement therewith.

For the foregoing reasons, this petition should be granted.

HAAS, HOLLAND, LEVISON & GIBERT
Attorneys for Appellant

By WILLIAM R. KING

Certificate

As counsel for the Appellant, I hereby certify that the foregoing Petition for Re-Hearing is presented in good faith and not to delay. I further certify that copies of the within petition have been served by mail upon counsel for all parties of record, this the 28th day of March, 1972.

WILLIAM R. KING

APPENDIX "D"

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 71-2270

MRS. BILLIE B. McCLURE
Plaintiff-Appellant,

versus

THE SALVATION ARMY
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Supplement To Petition For Re-Hearing

WILLIAM R. KING
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2709 First National Bank Tower
Atlanta, Georgia 30303
Area 404: 525-6141
Attorneys for Appellant

Appellant supplements her Petition for Re-Hearing so as to specify the relief she seeks and the direction she believes this Court should give to the handling of costs in this Court and in the court below.

Not only does the Appellant desire reversal of that part of the judgment of the district court which assesses costs against her, but she also desires that she not be assessed costs of the appeal in this Court or costs of the appeal taxable in the district court pursuant to Rule 39(e), F.R.A.P.

Additionally, Appellant has incurred expenses of $104.00 for a copy of the transcript of the proceedings in the district court in order to prepare her appeal, $25.00 fee to docket her appeal, and $10.00 premium for a cost bond in this Court.

For the policy reasons regarding Title VII suits as stated in her Petition for Re-Hearing, Appellant feels those expenses should be refunded to her.

The power of the Court to do so stems from 28 U.S.C. 1915 and 28 U.S.C. 753 construed in light of the enforcement scheme of Title VII and the specific provisions for appointing counsel and authorizing the action without payment of costs or fees or giving security therefor, 42 U.S.C. §2000e-5(e). (Section V of the EEOC's amicus brief discusses this question and the Court's attention is directed thereto.)

For these reasons, the Appellant requests this Court to amend its judgment to reverse so much of the judgment of the district court as assesses costs against the Plaintiff and to provide:

> (1) That no cost of appeal shall be taxed against Plaintiff by this Court or in the district court;
>
> (2) That the Clerk of this Court shall refund to the Plaintiff the $25.00 docket fee paid on her account; and,
>
> (3) That the Clerk of the District Court is authorized to pay to the court reporter the $104.00 cost of a

copy of the transcript furnished to Mrs. McClure and, upon receipt of said sum from the Clerk, said court reporter shall promptly refund to Mrs. McClure $104.00 which was paid to him for furnishing a copy of the transcript to Mrs. McClure.

Alternatively, Appellant requests that the Court reverse so much of the district court's judgment as assesses costs against Plaintiff and further provide that each party shall bear its own costs of this appeal and costs of the action in the court below.

Respectfully submitted,

HAAS, HOLLAND, LEVISON & GIBERT
Attorneys for Appellant
By: WILLIAM R. KING

Certificate

As counsel for the Appellant, I hereby certify that the foregoing Supplement to Petition for Re-Hearing is presented in good faith and not to delay. I further certify that copies of the within supplement have been served by mail upon counsel for all parties of record, this the 6th day of April, 1972.

WILLIAM R. KING

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

Petitioner,

v.

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL HEADQUARTERS OF THE SALVATION ARMY AS *AMICUS CURIAE* IN OPPOSITION

INTEREST OF *AMICUS CURIAE*

The Salvation Army is an international religious denomination, a church of the Christian faith, organized and operated on a military pattern, with its own body of religious doctrine, its own ministers of the Gospel (referred to as "Officers") and its own church members (referred to as "soldiers"). Its churches (referred to as "corps") within the United States are organized on a geographic basis into four Territories. Respondent herein, The Salvation Army,

a Georgia corporation, is the legal entity through which the affairs of the Southern Territory of The Salvation Army are conducted. The supervision and coordination of all activities of The Salvation Army in the United States is the responsibility of the National Headquarters of The Salvation Army, this *amicus curiae*.

Since the issues involved in this case are of vital significance to the relationship between The Salvation Army and its clergy, 3,800 Officers serving throughout the United States, the National Headquarters of The Salvation Army requested the consent of the parties to the filing of this brief *amicus curiae*. A letter from each of the parties evidencing such consent was filed with the Clerk of this Court simultaneously with the filing of this brief.

OPINIONS BELOW

The citations to the opinions below are fully set forth in the Brief of Respondent in Opposition.

JURISDICTION

For the reasons set forth in the Brief of Respondent in Opposition, this *amicus curiae* submits that the untimely filing of the Petition deprived this Court of jurisdiction to grant a writ of certiorari in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution which, in pertinent part, provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof • • •."

Also involved are certain provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* As amended by the Equal Employment Opportunity Act of 1972, those provisions of Title VII which are pertinent to the issues discussed in this brief *amicus curiae* are

(1) Section 701(b), 42 U.S.C. § 2000e(b):

"The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or proceeding calendar year, and any agent of such a person * * *."

(2) Section 701(f), 42 U.S.C. § 2000e(f):

"The term 'employee' means an individual employed by an employer * * *."

(3) Section 702, 42 U.S.C. § 2000e-1:

"This subchapter shall not apply to * * * a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its activities."

(4) Section 703(a), 42 U.S.C. § 2000e-2(a):

"It shall be an unlawful employment practice for an employer—

"(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

"(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."

(5) Section 704(a), 42 U.S.C. § 2000e-3(a):

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment * * * because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

QUESTIONS PRESENTED

The questions presented in this case are:

1. Whether the Religion Clauses of the First Amendment to the United States Constitution prohibit the application of the equal employment opportunity provisions of Title VII of the Civil Rights Act of 1964 to the relationship between a church and its ministers.

2. If so, whether Title VII of the Civil Rights Act of 1964 can be construed so as to avoid the constitutional question.

STATEMENT

Only three facts, as found by the District Court (Petitioner's Appendix A. 2a-5a), accepted by the Court of Appeals (Pet. App. A. 9a) and conceded by petitioner (Pet. App. A. 5a & 13a), are essential to a resolution of the issues raised in this case:

1. The Salvation Army is a church.
2. As a Salvation Army Officer, petitioner was a duly commissioned minister of that church.
3. Throughout her entire employment relationship with The Salvation Army, petitioner was performing the duties and functions of a minister of the Gospel.

On July 15, 1970, shortly after being advised that her officership in The Salvation Army was being terminated for unsatisfactory service, petitioner commenced a civil action against The Salvation Army in the United States District Court for the Northern District of Georgia, alleging that it had engaged in discriminatory employment practices against her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*

The complaint alleged that petitioner had been denied certain allowances and other benefits given to male Salvation Army Officers and that female Salvation Army Officers generally do not receive comparable assignments, allowances and other benefits. The relief sought by petitioner was reinstatement, an injunction against further discrimination and a judgment for the alleged difference between the compensation paid to male Salvation Army "employees" whose responsibilities were equivalent to those performed by petitioner and the compensation paid to her.

The Salvation Army moved to dismiss the complaint for want of jurisdiction on the grounds (1) that it was neither an "employer" nor a person engaged in an "industry affecting commerce" within the meaning of Section 701(b) and (h) of the Act, 42 U.S.C. § 2000e(b) & (h), and (2) that, since it is a "religious corporation" for which the petitioner had voluntarily agreed to perform "work connected with the carrying on by such corporation * * * of its religious activities", it was not subject to the provisions of Title VII of the Act by reason of Section 702 thereof, 42 U.S.C. § 2000e-1.

In addition to its motion to dismiss the complaint, The Salvation Army filed an answer asserting, *inter alia*, that, since it is a church, application of the provisions of Title VII of the Act to it under the circumstances of this case would constitute a violation of the First Amendment to the United States Constitution.

After discussing a number of First Amendment cases, the District Court concluded that "any allowance, salary, or funds received by * * * [Salvation Army] Officers, their work assignments or their places of assignment, among any other grievances Mrs. McClure may have, are matters of religious activity into which the Court may not inquire under prior decisions and * * * [Section 702 of the Act]" (Pet. App. A. 7a). The District Court then granted respondent's motion to dismiss the complaint, holding that The Salvation Army is a "religion" and that petitioner's work was "connected with [the] carrying on of the religious activities of The Salvation Army" within the meaning of Section 702 of the Act (Pet. App. A. 5a & 8a).

On appeal, the United States Court of Appeals for the Fifth Circuit unanimously affirmed the order of the District Court, but on different grounds. The Court of Appeals found that The Salvation Army is an "employer" engaged in an "industry affecting commerce" within the meaning of Section 701(b) and (h) of the Act (Pet. App. A. 15a-16a), that petitioner was an "employee" of The Salvation Army within the meaning of Section 701(f) of the Act, 42 U.S.C. § 2000e(f) (Pet. App. A. 17a), and that Section 702 of the Act did not exempt The Salvation Army and other religious organizations from liability for discriminating against their employees on the basis of race, color, sex or national origin with respect to their compensation, terms, conditions or privileges of employment (Pet. App. A. 18a).

The Court of Appeals then considered the question of whether the application of the provisions of Title VII of the Act to the relationship between The Salvation Army, a church, and petitioner, one of its ministers, would violate either of the Religion Clauses of the First Amendment

(Pet. App. A. 19a). After carefully reviewing the applicable decisions of this Court, the Court of Appeals concluded that the application of Title VII to the relationship between The Salvation Army and its Officers "would result in an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the free exercise clause of the First Amendment" (Pet. App. A. 24a-25a).

Now faced with the choice of declaring Title VII of the Act unconstitutional or of construing Title VII in such a manner as to avoid the constitutional infirmity, the Court of Appeals held that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (Pet. App. A. 25a).

Petitioner has asked that a writ of certiorari be granted by this Court to review this decision.

ARGUMENT

I.

Certiorari Is Not Warranted in This Case

This case arises on respondent's motion to dismiss petitioner's complaint for want of jurisdiction. Petitioner argued and lost the motion in the District Court and took an appeal to the Court of Appeals. There, the very points now being raised by petitioner were exhaustively briefed not only by petitioner and respondent but also by the Equal Employment Opportunity Commission and the National Headquarters of The Salvation Army as *amici curiae*. In a long, well-reasoned opinion, the Court of Appeals unanimously affirmed the order of the District Court. Petitioner now asks this Court to review that ruling. But, as Mr. Chief Justice Taft observed, "The jurisdiction

[of the Supreme Court to bring up cases by certiorari] was not conferred upon this Court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* v. *Coty,* 262 U.S. 159, 163 (1923).

With respect to the grounds for the granting of a petition for a writ of certiorari, Rule 19[1] of the Revised Rules of the Supreme Court of the United States provides, in part:

> "A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor * * *."

Are there "special and important reasons" for granting certiorari in this case?

Petitioner asserts that this case involves the constitutionality of an important federal statute and contends that this question "should be settled by this Court" (Pet. 14). While the specific issue raised by this case, the constitutionality of Title VII as it relates to the relationship between The Salvation Army and its Officers, has never been tested in this Court, the broad principle involved, the protection of the relationship between a church and its clergymen against governmental interference on First Amendment grounds, has been considered by this Court many times. Where, as here, the issue was resolved by the Court of Appeals in a manner completely consistent with the applicable decisions of this Court and in such a way as to preserve the constitutionality of the federal statute in question, there is no need for this Court to grant certiorari.

Despite petitioner's attempt to expand the holding of the Court of Appeals, the issue involved in this case is a narrow one: whether the equal employment opportunity provisions of Title VII may be applied in the relationship between a church and its ministers without violating the Religion Clauses of the First Amendment. Petitioner, on the other hand, describes the "critical question" to

be resolved by this Court as "whether the First Amendment gives a license to churches and other religious organizations to engage in racial, sexual, or national origin discrimination against their employees" and asserts that "the effect of the decision below is to leave thousands of employees of religious organizations uncertain of whether they are or are not protected by the equal employment opportunity statutes" (Pet. 14). In making such statements, however, petitioner conveniently chooses to disregard the District Court's finding which emphasized the important distinction between The Salvation Army's Officers, who are all duly commissioned ministers of the Gospel, and its other employees:

> "There is also a classification known as 'employees,' of which there are approximately 3,000 in the Southern Territory. Employees may be of any race, any background, any origin and they generally bring with them certain needed skills, ranging from doctors to laborers, but they are never commissioned officers of the Army" (Pet. App. A. 3a).

This distinction was also recognized by the Court of Appeals which stated that it was "restricting our decision to the church-minister relationship and expressly refraining from any decision as to other church employees of a type not involved in this controversy * * *" (Pet. App. A. 10a).

Despite petitioner's suggestions to the contrary (Pet. 11), the question of whether The Salvation Army followed its own procedures and accorded petitioner "due process" before discharging her is not before this Court. Moreover, petitioner's contention that certiorari should be granted to review the applicability of the retaliatory discharge provisions of Section 704(a) of the Civil Rights Act, 42 U.S.C. §2000e-3(a), "even if the Salvation Army's status as a church exempted it from the §703 claim of sex discrimination" (Pet. 23), ignores the fact that Section 704(a) of

the Act, like Section 703, cannot be invoked unless it is determined that clergymen are "employees" covered by Title VII. Thus, the Section 704(a) question raised by petitioner affords no independent basis for review.

Since the question of federal law involved in this case is simply whether the application of Title VII to clergymen violates the First Amendment, and since this question was decided by a unanimous Court of Appeals in a manner completely consistent with the applicable precedents of this Court and in such a way as to uphold the constitutionality of Title VII, certiorari is not warranted in this case.

II.

The Decision Below Is Clearly Correct

The Salvation Army's Officers, all duly commissioned ministers of the Gospel, are the very core of The Salvation Army. As the Court of Appeals correctly pointed out (Pet. App. A. 24a), if the EEOC, through Title VII of the Civil Rights Act, were permitted to inject itself into such matters as the "compensation, terms, conditions or privileges of employment" of Salvation Army Officers, it would constitute a direct interference with the manner in which The Salvation Army fulfills its religious mission. Such interference would clearly violate the First Amendment.

The intent of the First Amendment, said Thomas Jefferson shortly after its adoption, was to erect "a wall of separation between church and state." *Reynolds* v. *United States*, 98 U.S. 145, 164 (1878). Except in those rare cases where "grave and immediate danger" is threatened, *West Virginia State Board of Education* v. *Barnette*, 319 U.S. 624, 639 (1943), this Court has consistently held that the "wall must be kept high and impregnable", *Everson* v. *Board of Education*, 330 U.S. 1, 18 (1947), that, in enjoining interference of the government in affairs of religion, "the prohibition is absolute", *Zorach* v. *Clauson*, 343 U.S. 306, 312 (1952), and that in matters of religion, "no official, high or petty, can prescribe what shall be

orthodox", *West Virginia State Board of Education* v. *Barnette, supra,* 319 U.S. at 642.

In its decision, the Court of Appeals gave careful consideration to the applicable precedents of this Court, *Watson* v. *Jones,* 13 Wall. 679 (1871), *Gonzalez* v. *Roman Catholic Archbishop,* 280 U.S. 1 (1929), *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), *Kreshik* v. *St. Nicholas Cathedral,* 363 U.S. 190 (1960) (per curiam) and *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969).

As the Court of Appeals recognized, these cases stand for the proposition that matters of church government and administration, including ecclesiastical rules, customs, laws and practices, as well as those of faith and doctrine, are beyond the purview of civil authorities. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra,* 393 U.S. at 449; *Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 107-08, 116; *Watson* v. *Jones, supra,* 13 Wall. at 727. These are "matters at the very core of a religion" and are thus protected against governmental infringement by the First Amendment. *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church, supra,* 393 U.S. at 450. Where no improper methods are shown, the right of a church to determine the essential qualifications of, select, assign, discipline and discharge its clergymen is also protected by the Free Exercise Clause of the First Amendment. *Kedroff* v. *St. Nicholas Cathedral, supra,* 344 U.S. at 107-08, 116. *Cf. Gonzalez* v. *Roman Catholic Archbishop, supra,* 280 U.S. at 16. It therefore follows that legislation which attempts to regulate matters of church government or the relationship between a church and its ministers is an unconstitutional instrusion of governmental power into "the forbidden area of reli-

gious freedom". *Kedroff* v. *St. Nicholas Cathedral*, 344 U.S. at 107-08, 119.

As with any other religious denomination, the relationship between The Salvation Army and its Officers, its ministers of the Gospel, is of the greatest importance, underlying the very organization and the disciplines of The Salvation Army and its effectiveness in performing its particular religious and charitable functions. Surely this relationship is one of those "matters at the very core of a religion" which the Free Exercise Clause was designed to protect. Moreover, the constitutional right of The Salvation Army to select and dismiss its Officers certainly carries with it the concomitant right to fix the terms of its relationship with its Officers and the conditions under which they pursue their ministry.

It is important to note that the operative provision of Title VII, Section 703(a), covers not only the relatively simple matter of discrimination in compensation (e.g., salaries, bonuses, etc.) but also the much more complex and difficult areas of discrimination in the "terms, conditions, or privileges of employment". No matter what the basis of discrimination, can the federal government, through the EEOC or otherwise, dictate the terms of a minister's calling? Is the EEOC going to be permitted to investigate a Salvation Army Officer's hours, place of assignment, type of activity assigned or the number of hardships he must undergo in order to fulfill his religious mission? Would it be consistent with the First Amendment to permit the EEOC to entertain a complaint from a Roman Catholic nun that her quarters were not every bit as commodious as those of the parish priest? If unrestrained by the First Amendment, Section 703(a) of the Civil Rights Act, like the tentacles of an octopus, would reach so deeply into the

intimate relationship of the church and its ministers that it would strangle or at least seriously disrupt the most basic function of a minister, the spreading of the Gospel.

Petitioner argues, however, that the Court of Appeals has misinterpreted the test set forth by this Court with respect to the applicability of the Free Exercise Clause:

> "This is not a case where a church, or one or more of its adherents, are aggrieved by a statute which imposes a burden on the exercise of religious beliefs or practices. * * *" (Pet. 14)

Yet the cases discussed above clearly stand for the proposition that governmental interference with the right of a church to establish the qualifications of, select, assign, discipline and discharge its clergymen violates the Free Exercise Clause just as surely as a government regulation forbidding a religious denomination from practicing its religion.

Petitioner then asserts:

> "Nor is there any claim made that the religious tenets of The Salvation Army authorize or require the unequal treatment of women. On the contrary, Salvation Army doctrine requires equal treatment of women. * * *" (Pet. 15)

Petitioner has attempted to interpret Salvation Army doctrine in such a way as to make it appear to be consistent with the objectives of Title VII with respect to discrimination based on sex and would therefor invoke the aid of the federal courts to enforce her interpretation of The Salvation Army's doctrine in this regard. However, even if petitioner's interpretation were correct, it must be remembered that Title VII could not be applied to The Salvation Army and its Officers for the purpose of remedying this form of alleged discrimination without necessarily subjecting The Salvation Army to the provisions of Title

VII for all other purposes as well, and there is no showing on this record as to what The Salvation Army's doctrines may prescribe with respect to the race, color or national origin of its Officers. If its doctrine requires that male and female Officers be treated equally, The Salvation Army is certainly to be commended. And if its doctrine in this respect seems to be consistent with the objectives of Title VII of the Civil Rights Act, all the better. However, this does not give Congress the right, through the EEOC or otherwise, to inject itself into this constitutionally protected area for the purpose of attempting to determine whether The Salvation Army or any other church is in fact adhering to its doctrines, tenets or practices with respect to its clergy.

In support of her view that Title VII may be applied to the church-minister relationship without violating the Free Exercise Clause, petitioner cites *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), *cert. denied*, 347 U.S. 1013 (1954) (involving the application of the Fair Labor Standards Act to non-minister employees of a religious organization who worked in the production, printing, handling, addressing and distributing of the printed materials issued by the organization); *Cap Santa Vue, Inc.* v. *NLRB*, 424 F.2d 883 (D.C. Cir. 1970) (involving the application of the National Labor Relations Act to non-minister employees of convalescent homes operated by a religious organization); *Parker* v. *Commissioner of Internal Revenue*, 365 F.2d 792 (8th Cir. 1966), *cert. denied*, 385 U.S. 1026 (1967) (involving the application of the tax exemption for religious organizations provided in Section 501 of the Internal Revenue Code of 1954 to the "Foundation For Divine Meditation"); *Church of Scientology of California* v. *Richardson*, 437 F.2d 214 (9th Cir. 1971) (involving the application of the Federal Food, Drug and Cosmetic Act to the importation of electrical devices known as

"E-meters" used in the practice of "Scientology"); and *United States* v. *Kuch*, 288 F. Supp. 439 (D.D.C. 1968) (involving the question of whether a self-proclaimed "minister" of the "Neo-American Church" who asserted that her "religious beliefs" required her to take psychedelic drugs could be indicted for posssession of LSD).

Petitioner then criticizes the Court of Appeals for failing to make "any analysis of these cases and the doctrines which they reflect * * *" (Pet. 17). However, in not one of these cases was the constitutionally protected relationship between a church and its ministers involved. Since none of these cases is helpful in answering the question presented in this case, the failure of the Court of Appeals to consider them is understandable.

Petitioner also contends that the Court of Appeals "misapplied" the test laid down by this Court in *Sherbert* v. *Verner*, 374 U.S. 398 (1963), for determining whether there has been an impermissible infringement of the free exercise of religion (Pet. 18). Step one of the *Sherbert* test is a determination of whether the state action imposes a burden on the free exercise of religion. Petitioner asserts that this step is not satisfied because "there is no visible infringement of religious liberty" (Pet. 18). Yet this Court has repeatedly held that governmental interference with the right of a church to establish the qualifications of, select, assign, discipline and discharge its clergy in a way allegedly mandated by Section 703(a) of the Act clearly violates the Free Exercise Clause, and the Court of Appeals so recognized (Pet. App. A. 20a-24a). The second step involves a determination of whether some "compelling state interest" sought to be achieved justifies the infringement of the free exercise right and here this Court warned: "[I]n this highly sensitive constitutional area, '[o]nly the gravest abuses, endangering paramount interests, give occasion for

permissible limitation' [footnote omitted]." *Sherbert* v. *Verner, supra,* 374 U.S. at 406. Petitioner argues that "the governmental interest in eradicating invidious discrimination based on sex, race or national origin * * * is no less than *compelling* * * * " (Pet. 18) (emphasis in original). But is this interest just as "compelling" when applied to clergymen and members of religious orders? Can we say that the refusal of the Roman Catholic Church to admit women to the priesthood is the type of "grave abuse" which Title VII was intended to remedy? Is there a "compelling state interest" in securing equal pay scales for priests and nuns? Will the intent of Title VII be seriously frustrated if these and similar objectives are not achieved? Although the Court of Appeals did not deny that there is a strong public policy against discriminatory employment practices, it correctly recognized that this policy must give way when the relationship between a church and its ministers is involved.

A similar clash between a "compelling state interest" and the free exercise of religion was faced by this Court in *Wisconsin* v. *Yoder,* 92 S. Ct. 1526 (1972). In that case, the respondents, Amish parents who believed that their children's attendance at high school, public or private, was contrary to their religion and way of life, were convicted for violating Wisconsin's compulsory school attendance law when they refused to send their children to school beyond the eighth grade. This Court recognized that a state's obligation to provide children with an education was a "paramount responsibility" and one which ranked "at the very apex of the function of a State". *Id.* at 1532. Nevertheless, in holding that the state could not compel these parents to send their children to high school, this Court said:

> "Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First

> Amendment and the traditional interest of parents with respect to the religious upbringing of their children • • • ." *Id.*

Surely the right of a church to select, assign and discipline its ministers is an even greater "fundamental right and interest" which must be protected by the Free Exercise Clause. While equal employment opportunity is certainly a desirable objective, as this Court has observed: "The values underlying • • • [the Religion Clauses] have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance." *Id.* at 1533.

Petitioner has urged this Court to grant certiorari to "settle the question in a manner which will safeguard equal employment opportunity without in any way damaging religious liberty" (Pet. 19). Unfortunately, such an accommodation is not possible in this case. We are faced with a clash between the laudible objectives of Congress in enacting Title VII and the constitutionally protected right to the free exercise of religion. Under such circumstances, the Court of Appeals was clearly correct in holding that the former must yield to the latter.

Although the Court of Appeals chose to base its decision on the Free Exercise Clause, it could have reached the same result by applying "the independent measure of constitutionality" under the Religion Clauses described as the "entanglement" test. *Tilton* v. *Richardson*, 403 U.S. 672, 685 (1971).

The "entanglement" test was first articulated by this Court in *Walz* v. *Tax Commission*, 397 U.S. 664 (1970). Since then, it has been applied or referred to in *Gillette* v. *United States*, 401 U.S. 437 (1971) and the companion cases of *Lemon* v. *Kurtzman* and *Robinson* v. *DiCenso*, 403 U.S. 602 (1971).

Several principles can be drawn from these cases. First, if the end result of involvement between church and state would be "an excessive government entanglement with religion", it is violative of the First Amendment. *Walz* v. *Tax Commission, supra*, 397 U.S. at 674. Second, in each

case the court must decide whether the particular governmental act or activity in question would foster an "excessive entanglement" and must therefore be struck down or whether it would create only a "minimal and remote involvement" and may therefore be upheld. *Id.* at 670 & 676. If the involvement in question is "a continuing one calling for official and continuing surveillance", it is probably "excessive". *Id.* at 675. Third, governmental attempts to intrude upon, restrain, meddle in, monitor, interfere with, direct or control church affairs or religious activity or practice may constitute excessive entanglement. *Lemon* v. *Kurtzman, supra*; *Walz* v. *Tax Commission, supra.* Excessive entanglement may also be present in those instances where the involvement requires a "comprehensive, discriminating and continuing state surveillance" of religious activity, *Lemon* v. *Kurtzman, supra*, 403 U.S. at 619, or will ensnare the state in "details of administration", *Walz* v. *Tax Commission, supra,* 397 U.S. at 695 (Harlan, J., concurring), or will involve the government "in difficult classifications of what is or is not religious", *Gillette* v. *United States, supra*, 401 U.S. at 457, or include the post-audit power to inspect and evaluate church financial records, *Lemon* v. *Kurtzman, supra*, 403 U.S. at 620.

If the provisions of Title VII were construed to be applicable to the relationship between The Salvation Army and its Officers, the resulting involvement would inevitably lead to an excessive and continuing entanglement between church and state. The EEOC would be required to engage in a "comprehensive, discriminating, and continuing • • • surveillance" of The Salvation Army's employment policies, practices and records. The relationship thereby created would be "pregnant with dangers of excessive government direction" of The Salvation Army's relationship with

its Officers and thus would be violative of the First Amendment. *Lemon* v. *Kurtzman, supra,* 403 U.S. at 620.

Petitioner has alleged that female Salvation Army Officers receive less favorable assignments than their male counterparts. Surely this would be a "condition of employment" covered by Title VII and over which the EEOC would have jurisdiction. Yet how is the EEOC going to weigh the relative merits of one Officer's assignment with that of another's? How is the EEOC going to determine which Officer is most qualified to receive a given religious assignment in The Salvation Army? Because the relationship between a church and its ministers is one of those "matters at the very core of a religion" and thus protected from state infringement by the First Amendment, *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450 (1969), only The Salvation Army can decide which Officer can best fulfill its particular religious and charitable mission in any given assignment at any given time and what compensation, benefits and allowances that Officer should receive. To permit the EEOC to make such decisions "in this highly sensitive constitutional area", *Sherbert* v. *Verner,* 374 U.S. 398, 406 (1963), is to install a censor over the church government and religious practices of The Salvation Army. This the First Amendment clearly forbids. *Cantwell* v. *Connecticut,* 310 U.S. 296, 305 (1940).

Implied in petitioner's argument is the contention that the application of Title VII to the church-minister relationship would involve only a small encroachment into this constitutionally protected area. But it was Madison who said: "[I]t is proper to take alarm at the first experiment on our liberties." Memorial and Remonstrance Against Religious Assessments, reprinted in the appendix to Jus-

tice Rutledge's dissenting opinion in *Everson* v. *Board of Education,* 330 U.S. 1, 65 (1947).

Thus it is clear that the Court of Appeals' decision was correctly decided not only on the basis of the Free Exercise Clause but on the basis of the entanglement test as well.

After determining that the application of Title VII to the church-minister relationship would be violative of the First Amendment (Pet. App. A. 24a-25a), the Court of Appeals was faced with the choice of declaring Title VII unconstitutional or of construing Title VII in such a manner as to avoid the constitutional infirmity. In choosing the latter course, the Court of Appeals held that "Congress did not intend, through the non-specific wording of the applicable provisions of Title VII, to regulate the employment relationship between church and minister" (Pet. App. A. 25a), citing Mr. Justice Brandeis' concurring opinion in *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288, 341 (1936). In that opinion, Brandeis set forth seven "rules" used by this Court to avoid passing upon a constitutional question, the last of which is:

> "'When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' *Crowell* v. *Benson,* 285 U.S. 22, 62." *Id.* at 348 (footnote omitted).

Petitioner asserts that the Court of Appeals "misapplied" the *Ashwander* rule of statutory construction because "there is no support in the legislative history for the court's strained construction" (Pet. 19 & 21). The fact of the matter is, of course, that Congress never considered this specific problem. As the Court of Appeals recognized in construing Section 702 of the Act (Pet. App. A. 18a), Congress clearly intended to protect non-minister employ-

ees of religious organizations against all but religious discrimination. But can it be said, as petitioner contends, that Congress actually intended Title VII to regulate the relationship between a church and its ministers as well?

This Court faced a similar construction problem in *Church of the Holy Trinity* v. *United States*, 143 U.S. 457 (1892). The issue involved in that case was whether an act of Congress making it unlawful for any person to assist or encourage the importation or migration of any "alien" or "foreigner" to perform "labor or service of any kind" in the United States was applicable to a church which had entered into a contract with an English minister who was to become its rector and pastor. While the act expressly excluded professional actors, artists, lecturers, singers and domestic servants, no exemption was provided for clergymen. The contract between the church and the minister was found to be within the letter of the statute because it contemplated that the minister would perform services within the United States. However, this Court held that Congress had not intended the act to apply to the contract in question, saying "It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers." *Id.* at 459. After stating that "no purpose of action against religion can be imputed to any legislation, state or national," *id.* at 465, this Court announced the following general rule of construction:

> "It is the case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed

> that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the Courts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute." *Id.*

The Court of Appeals was understandably reluctant to attribute to Congress an intent which would necessarily render Title VII unconstitutional. Instead, the Court of Appeals chose to rely upon the "strong presumption that the law-making body has intended to act within, and not in excess of, its constitutional authority." *Plymouth Coal Co.* v. *Pennsylvania,* 232 U.S. 531, 546 (1914).

Since the Court of Appeals clearly reached the correct decision on each of the points discussed, there is no need for this Court to grant certiorari in this case.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in the Brief of Respondent in Opposition, the petition for a writ of certiorari should be denied.

August 22, 1972

Respectfully submitted,

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE, *Petitioner*

VS.

THE SALVATION ARMY, *Respondent*

Motion of the National Organization for Women for Leave to File Brief as Amicus Curiae

ON A PETITION FOR A WRIT OF CERTIORARI

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ON A PETITION FOR A WRIT OF CERTIORARI

The National Organization for Women moves this court for leave to file a brief in this case as amicus curiae. The consent of the attorney for the petitioner has been obtained, the attorney for respondent has been requested to give consent and has refused to consent to the filing of a brief by the National Organization for Women.

The applicant is the largest national civil rights organization for women in the United States with chapters throughout the country, including Atlanta, Georgia, where the petitioner herein resides. The

applicant's chapter in Atlanta, Georgia has given the petitioner great moral support in this lengthy litigation.

The purposes of the applicant organization are to achieve full equality for women in our society, including, but not limited to, obtaining enforcement of equal employment opportunity under the law. To this end the applicant has, through its officers, testified before Congress in the adoption of the legislation in question, has appeared before Federal and state courts, including this Court, in matters relating to employment discrimination against women.

The issues to be resolved in this case are vital to the purposes and members of the applicant.

The brief of the petitioner herein has raised the issue that there is a substantial constitutional question improperly avoided by the court and issue of constitutionality of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-1 et seq. However, the discussion of these issues is inadequate and is expanded upon in the brief of the applicant. If the arguments advanced by the applicant are approved by this Court, the decision of the courts below must be reversed.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF

1. Respondent seeks to argue, in its brief in opposition to the granting of certiorari (pp. 2-4), that the petition for certiorari was untimely filed, and that this Court is therefore without jurisdiction, pursuant to the provisions of 28 U.S.C. §2101(c). Respondent's argument is plainly mistaken.

In support of its argument, respondent asserts without the benefit of a single relevant supporting authority, that this Court should disregard the petition for rehearing filed by petitioner in the court below, and should compute the 90-day period allowed for filing a petition from the date of the original judgment of the court below. It is clear, however, and long has been so, that "A timely petition for rehearing tolls the running of the . . . period because it

operates to suspend the finality of the [lower] court's judgment, pending the court's further determination whether the judgment should be modified so as to alter its adjudication of the rights of the parties." *Department of Banking* v. *Pink,* 317 U.S. 264, 266 (1942).

The authorities offered by respondent in urging that this Court ignore the above well-established rule simply are without relevance to the facts of this case. The 90-day period for petitioning this Court for a writ of certiorari is tolled not only by the submission of a petition for rehearing to the court below, but also where the lower court, even in the absence of such a petition, has altered its judgment in respect to a matter of substance, or resolved an ambiguity in the earlier judgment. The authorities offered by respondent are relevant only to cases of the latter type. See, generally, Stern & Gressman, *Supreme Court Practice,* §§6.3-6.4, at pp. 248-252 (4th ed. 1969); see also the *entire* section at 32 Am. Jur. 2d, "Federal Practice and Procedure," §285, at pp. 750-751 (1967), cited in part by respondent. Thus, in *Fed. Trade Comm.* v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 208-209 (1952), the petitioner had never sought rehearing in the court of appeals of the judgment which it contested, but had merely, over one month after the expiration of the period for seeking such rehearing, filed a "memorandum" which did not seek revision of any matter of substance in the earlier opinion of the court of appeals. Similarly, in *Department of Banking* v. *Pink, supra,* this Court found itself without jurisdiction not only because the petitioner had failed to seek rehearing in the state court below, but also because all that the petitioner had sought was a statement that a federal question had been presented. Thus, the motion "was

no more than a request that the Court of Appeals declare what had in fact occurred upon its previous decision of the case." 317 U.S. at 266.

By contrast to the above cases, the petitioner in the present case, within the 14-day period prescribed by Rule 40 of the Federal Rules of Appellate Procedure, presented to the court below a petition for rehearing, plainly designated as such (see respondent's brief, p. 25). It is clear that such a petition tolls the running of the period for seeking certiorari. Where such a petition was timely filed in the court below, there is no precedent whatever for making an exception to this general rule because of the contents of the petition for rehearing, or because of the ultimate disposition.

2. The brief in opposition urges that this Court should not be concerned with such "hypotheticals" as part-time ministers (p. 10). But it is a matter of record (Petition, pp. 9-10) and conceded by respondent (Brief, pp. 7-8), that, at least during the latter part of her employment, Mrs. McClure's ministerial duties were, at most, part-time. Respondent argues that Mrs. McClure was nevertheless performing "a religious function for the Salvation Army, even while sitting behind a typewriter" (p. 8). However, this is functionally equivalent to the employees of a church who likewise considered themselves to be performing religious duties, while working in their church's printing plant. See *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F.2d 879 (7th Cir. 1954), cert. denied 347 U.S. 1013 (1954). The fact that a church employee[1] who works as a typist is also

[1] The court of appeals expressly found that Mrs. McClure was an "employee" within the terms of the statute, Pet. 17a, rejecting the contrary contentions of the Salvation Army.

qualified to perform ministerial duties does not make her any less an employee. Thus this case may not be likened, as respondent would have it, to that of a minister who has been ousted from, or denied, a pulpit. Compare *Gonzales* v. *Roman Catholic Archbishops of Manila,* 280 U.S. 1 (1929). The decision below is not limited to the "church-minister" relationship. Under the decision below, any church employee upon whom is bestowed the label "minister," is removed from the protection of equal opportunity legislation, regardless of the employee's actual duties.

3. Both respondent Salvation Army (pp. 12-16) and amicus curiae Salvation Army National Headquarters (pp. 11-12)[2] argue that the decision below was required by this court's decisions in *Watson* v. *Jones,* 80 U.S. (13 Wall.) 679 (1871); *Gonzales* v. *Roman Catholic Archbishops of Manila, supra; Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), 363 U.S. 190 (1960); and *Presbyterian Church* v. *Mary E. B. Hull Mem. Presbyterian Church,* 393 U.S. 440 (1969). We pointed out in the petition (p. 16) that these cases reflect an understandable judicial reluctance to adjudicate church property disputes which turn on theological doctrines. See Clark, "Guidelines for the Free Exercise Clause," 83 HARV. L. REV. 327, 343-344 (1969). Moreover, where this rule has been held to bar judicial examination of selection of clergy, this Court has clearly enunciated an exception for "arbitrariness," *Gonzales, supra,* 280 U.S. at 16, or "improper methods of choice," *Kedroff, supra,* 344 U.S. at 116. A discharge of a female in violation of a Federal anti-discrimination statute certainly raises serious

[2] The Salvation Army National Headquarters is only nominally an amicus curiae. In fact it is the ecclesiastical superior and supervisor of the respondent. See amicus brief, p. 2.

questions of arbitrariness and improper methods, thereby falling well within the exception.

4. Both briefs in opposition confuse the essential question in this case. The statute allows a religious organization to discriminate on religious grounds, but on no others. There is much rhetoric, some of it fanciful,[3] about the consequences of a decision in Mrs. McClure's favor. But nowhere is it asserted that any tenet of Salvation Army ecclesiastical dogma or doctrine either requires, or even authorizes, discriminatory treatment of females, in terms of salary and benefits. The brief of the Salvation Army Southern Region misstates the issue by urging that Mrs. McClure seeks judicial examination of whether the Salvation Army violated its doctrine on "The Position of Women" (p. 15). Mrs. McClure seeks nothing of the kind. She seeks only her right to equal employment opportunity under an Act of Congress. If the Salvation Army would seek to justify its action by reference to its doctrine on "The Position of Women," or any other doctrine, this might be an entirely different case, since it might give rise to a claim under the exemption. Surely it is no burden on the exercise of religion for a religious interest which claims an exemption to at least specify a religious basis for its claim. Once the specification is made, there may indeed be limits on the extent to which it can be investigated, see *United States* v. *Ballard*, 322 U.S. 78 (1944); cf. Gianella, "Religious Liberty, Non-Establishment and Doctrinal Development," 80 HARV. L. REV. 1381, 1417 (1967) ("Of course,

[3] See, e.g., amicus brief, p. 12, where the EEOC is likened to "the tentacles of an octopus," and p. 19, where it is feared that the EEOC will "install a censor over the church government and religious practices of the Salvation Army."

a minimal inquiry is necessary to avoid making a mockery of both religion and government. . . .")

Salvation Army National Headquarters appears to concede (p. 13) that there is no doctrinal justification for discrimination against women, but then implies, somewhat disingenuously, that there may be Salvation Army doctrine dealing with race, color or national origin (p. 14). The short answer is that the only question in this case concerns sex discrimination. But the more encompassing answer is that the statute permits religious discrimination, and no other, and any claim under the exemption, be it directed at women, blacks, or any ethnic group, must, to be cognizable, at least *claim* the existence of doctrinal support. There is no need whatsoever for the EEOC to determine whether the Salvation Army is "adhering to its doctrines, tenets or practices" (p. 14). The only question is whether it is adhering to the law.

In sum, this is not an action on an employment contract, where Mrs. McClure argues that the Salvation Army has violated its doctrine on the status of women. This is an action under an Act of Congress banning sex discrimination, and the Salvation Army, which is authorized to discriminate on grounds of religion, is yet to come forward with even a bare claim that discriminatory treatment of women is theologically justified.

5. Salvation Army National Headquarters attacks (pp. 15-16) petitioner's analysis (p. 18) of the compelling governmental interest test of *Sherbert* v. *Verner,* 374 U.S. 398 (1963), by contending that the governmental interest in protecting Mrs. McClure from sex discrimination is less

than compelling.[4] This thesis is not supported by any citation to legislative history, judicial decision, or scholarly commentary.[5]

The National Headquarters brief responds to the first prong of the *Sherbert* test, whether there is any infringement of free exercise, again by merely referring to the church property cases (p. 15), but without any showing how the determination of this claim will require any examination of church doctrine. And the third prong of the *Sherbert* test, whether there is any less onerous alternative to the regulation, is simply ignored.

6. A leading scholar in this area has analyzed the cases involving economic regulation of religious interests as follows:

> "The courts will not require the state to grant an exemption from economic regulations to religious interests if a preferential benefit would be conferred. Exemption under these circumstances would not simply

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[4] The National Headquarters of the Salvation Army completely misconstrues the governmental interest involved by characterizing equal employment opportunity as no more than a "desirable" or "laudible" [sic] "objective" (p. 17). But the legislative history of the Civil Rights Act of 1964, and the events which led to its enactment, and the obligatory commands of the statute itself, establish that Congress did more than simply utter a few precatory words about the desirability of eliminating discrimination through voluntary action.

[5] It is wildly beside the point, and borders on the frivolous, for the Salvation Army to argue that if Mrs. McClure prevails, women will have to be admitted to the Roman Catholic priesthood, and nuns and priests will have to receive equal pay scales (amicus brief, p. 16). What amicus Salvation Army overlooks is that which is common knowledge, that almost 2000 years of theological doctrine and practice of the Roman Catholic Church requires that its priesthood be limited to males.

> relieve the religious practitioner from a burden on the free exercise of religion, but would also turn the regulatory scheme into a device for advancing a particular religion. Such a preference would violate the nonestablishment principle, regardless of the interpretation given the establishment clause, and engender the interreligious disputes and rivalries which that clause was meant to avoid. Thus the general rule appears to be that religious exemptions from economic regulations are denied where uniformity of treatment goes to the essence of the regulatory scheme." Gianella, *supra*, 80 HARV. L. REV. at 1398-1399 (footnote omitted).[8]

The "purpose and primary effect" of the statute is totally secular, under the test established by this Court in *School District of Abington Township* v. *Schempp*, 374 U.S. 203, 222 (1963). The Salvation Army briefs in opposition, which totally overlook the *Schempp* test, emphasize instead, what they call the "entanglement" test of later cases (Respondent, pp. 16-17; amicus, pp. 17-18). But there is not even the slightest occasion to consider "entanglement," where there is no religious interest which is even visible, much less claimed. Salvation Army National Headquarters, in its effort to keep its employment practices immune from Congress, contends that "accommodation is not possible in this case" (p. 17). But the thrust of all this Court's recent decisions is to search for an accommodation, even

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[8] Decisions which reflect these principles are collected at p. 17 of the petition. See also *United States* v. *Kissinger*, 250 F.2d 940 (3d Cir.), cert. denied 356 U.S. 958 (1958) (religious scruples against wheat quotas); *Shapiro* v. *Lyle*, 30 F.2d 971 (W. D. Wash. 1929) (suit by chief rabbi of several Jewish congregations challenging constitutionality of National Prohibition Act because of restrictions on availability of wine for religious purposes).

if a "tight-rope" must be traversed, *Walz* v. *Tax Commission*, 397 U.S. 664, 672 (1970), "by preserving doctrinal flexibility and recognizing the need for a sensitive and realistic application of the Religion Clauses . . ." *Wisconsin* v. *Yoder*, —— U.S. ——, 40 U.S.L.W. 4476, 4480 (May 15, 1972).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

Supreme Court, U.S.
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No. 72-134

MRS. BILLIE McCLURE,

Petitioner,

v.

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE NATIONAL ORGANIZATION FOR WOMEN AS AMICUS CURIAE IN SUPPORT

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INTEREST OF AMICUS CURIAE

The National Organization for Women (NOW) is a non-profit organization of women and men with chapters throughout the United States. Its purposes are to bring women into the full and equal partnership with men in all aspects of social, economic and political life.

NOW is particularly concerned with combating policies and practices of sex-based discrimination in employment. It has participated in numerous cases before Federal and State courts involving employment discrimination issues. NOW has, through its officers, given testimony before Congress on various aspects of the statute in question here, Title VII of the Civil Rights Act of 1964. It is included in Title 41 of the Code of Federal Regulations as one of those organizations to be consulted by employers seeking compliance with executive orders and regulations relating to affirmative action employment programs for Federal contractors.

The issues raised in this case are of great concern to the National Organization for Women and its members, since numerous women, including members in good standing of NOW, are employed by and active in religious organizations and associations. Women have long been recognized as the life-blood of our churches. They compose a significant part of the membership, volunteer workers, employees and contributors of American churches.

OPINIONS BELOW

Opinions of the United States District Court and the United States Court of Appeals for the Fifth Circuit are fully cited in the Brief of Petitioner.

GUIDELINES

Jurisdiction is conferred upon the court by 28 U.S.C. §1254 (1). Petitioner has made a timely petition for certiorari having filed within ninety days of the date on which the Court of Appeals acted on petitioner's timely petition for a rehearing, that date being April 26, 1972 as set forth in the Brief of Petitioner.

REASONS FOR GRANTING THE WRIT

This court should grant certiorari because important Federal issues have been raised in this case and decided by the Court of Appeals. These issues involve significant constitutional questions, interpretation of legislation promulgated to protect minority rights of employment and construction of the doctrine of avoidance of the constitutional question.

The issues raised have not been correctly or finally determined by the Court of Appeals. This court should resolve those questions.

STATISTICS AND CONSTITUTIONAL PROVISIONS INVOLVED

This case involves Title VII of the Civil Rights Act of 1964 (42 U.S.C. §200e, et seq.).

"§702 (s200e-1) *Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions.*

"This subchapter shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its religious activities or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.

"§703 (§2000e-2.) *Unlawful employment practices—Employer practices.*

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§704 (§200e-3.) *Other unlawful employment practices—Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings.*

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a change, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter."

Pertinent to this case is that part of the First Amendment which provides:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof ***."

QUESTIONS PRESENTED

1. Did the Court of Appeals err in its application and interpretation of the doctrine of *Ashwander* v. *Tennessee Valley Authority,* 297 U.S. 288 (1936) regarding avoidance of constitutional issues when it construed the applicable provisions of Title VII to exclude from its purview the employment relationship between church and minister?

2. Did the Court of Appeals err in its finding that Congress did not intend to include the employment relationship between religious organizations and its ministers?

3. Did Congress exceed its constitutional authority or violate the religious freedom provisions of the First Amendment by enacting §702 of Title VII of the Civil Rights Act of 1964 to provide that religious organizations are not exempt from the prohibitions against employment discrimination on the grounds of race, color, sex, or national origin, including employees who perform ministerial functions?

STATEMENT

The opinions of the courts below establish that the petitioner was commissioned as an officer, a category deemed minister, of the Salvation Army in June, 1967 after a two-year training period at its Officers Training Schoool. Mrs. McClure then served as a Corps Commander, Welfare Casework Supervisor and a secretary.

Her officership was terminated on July 19, 1970, less than a month after she had filed a complaint with the Equal Employment Opportunity Commission (EEOC) alleging that she and other women officers received lower

salaries and fewer benefits than their male counterparts and charging violations of Title VII, §703(a), of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a) by the Salvation Army Corporation of the Southern Territory.

The EEOC failed to obtain respondent's compliance and on July 15, 1970, Mrs. McClure commenced this action in the United States District Court for the Northern District of Georgia.

The District Court found that The Salvation Army is a religion, that Mrs. McClure's functions and grievances were matters of religious activity and, therefore, were within the exemptions of 42 U.S.C. §2000e-1.

The Court of Appeals upheld the finding that the Salvation Army is a church and Mrs. McClure a minister, but went on to find that the Army was within the definition of employer and Mrs. McClure an employee as set forth in Title VII, §§42 U.S.C. 2000e (f) (h).

After disposing of these questions, the Court first confronted, then avoided, the constitutional issue of whether the application of Title VII's provisions to the relationship of church and minister violated the Religion Clauses of the First Amendment.

It did so by applying the doctrine of avoidance of constitutional issues as set forth in *Ashwander* v. *Tennessee Valley Authority,* supra, finding that a construction of Title VII was possible so as to avoid the constitutional question. The Court discussed the line of cases defining and protecting free exercise of religion under the First Amendment. Then without discussion of legislative history, the Court decided that Congress did not intend "through the non-specific wording of the applicable pro-provisions of Title VII, to regulate the employment relationship between church and minister".

Petitioner filed a petition for rehearing and the Court of Appeals reversed the District Court's assessment of costs against petitioner, ordering each party to bear its own costs.

Petitioner's permission to proceed *in forma pauperis*, granted at the time action was instituted, was denied, upon her application for a copy of the transcript of the evidentiary hearing, because of a change in financial circumstances. Her motion for leave to appeal *in forma pauperis* was also denied by the District Court and that order was upheld by the Court of Appeals for the Fifth Circuit.

ARGUMENT

I.

The doctrine of avoidance of constitutional questions as set forth in the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, supra, and relied upon by the Court of Appeals, has been misconstrued and misapplied by that Court. The lower court seems to disregard the remarks of the Justice when he notes, quoting from *Crowell* v. *Benson*, 285 U.S. 22 (1932), that the doctrine will be followed if another construction of the statute is "fairly possible". The purpose of the doctrine is to avoid holding legislative enactments unconstitutional or ruling on their constitutionality if they can be otherwise construed, provided that construction is consonant with legislative intent. This Court has repeatedly remarked that this doctrine does not warrant a strained, perverted or distorted construction so as to render the statute vague or unclear. *Jay* v. *Boyd*, 351 U.S. 345 (1956), *Scales* v. *United States*, 367 U.S. 211 (1960); and *Aptheker* v. *Secretary of State*, 378 U.S. 500 (1964).

Had the Court of Appeals heeded the warning of this Court in *United States* v. *Sullivan,* 332 U.S. 689, 693 (1948), that:

> "A restrictive interpretation should not be given a statute merely because Congress has chosen to depart from custom or because giving effect to the express language employed by Congress might require a court to face a constitutional question."

it would have dealt head on with the issue of constitutionality and resolved it.

The "plain meaning" of Title VII §702, is clear. The Congress intends to deal with religious organizations in their employee-employer relationships just as it does with other organizations with the exception of religious-based discrimination. There is no exemption of church-minister relationships under Title VII except as they relate to religious orientation *and* religious activities. In other words, religious organizations are *only* exempt from the proscription on religious discrimination in its religious activities.

In all other respects, it is clear that churches and religious organizations are subject to the prohibitions against race, color, sex and national origin discrimination.

The Court of Appeals in reaching its conclusion on Congressional intent failed to review or consider the legislative record of the Civil Rights Act of 1964. That record is extensive. §702 of Title VII, the portion pertinent here, was amended to its final, adopted version in the Senate.

The purpose and scope of that section is clear. Religious organizations were to be exempt only as to those practices relating to the employment of individuals of a particular religion to perform work connected with the employer's religious activities. (See: 110 Cong. Rec.

12722). For example, a Presbyterian church could not be liable for refusal to hire a Mormon choir director; but, it would be liable if it refused to hire a black minister of education if that refusal was based on the person's race and not on any religious doctrine or practice.

There seemed to be no question in the minds of the Senators regarding the meaning of this section. The 1972 Amendments to this section raised a lengthy debate and the Congressional record is replete with discussions of its coverage.[1] The meaning of §702 was very clear to Senator Ervin who objected to the inclusion of ministers and other employees of religious organizations within the purview of Title VII. [2]Senator Williams, an author of the bill argued that:

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1. Sec. 702, s2000e-1, as amended by the Equal Employment Opportunity Act of 1972, now reads as follows:

> "Subchapter not applicable to employment of aliens outside State and individuals for performance of religious and educational activities of religious corporations, associations, or societies and educational institutions".

The amendment now includes all activities of a religious institution and is not restricted to religious activities as was its predecessor. The amendment became effective in 1972, and applies only to charges filed after that date.

2. Senator Ervin's extensive remarks are set forth in 118 Cong. Rec. s928 et seq. and s2061, February 1, 1972 and February 17, 1972. He saw the 1972 Amendments to Sec. 702 as exempting religious organizations from the provisions of the Act "insofar as the right to employ people of any religion they are fit is concerned. That is the only effect of this amendment," (s2061). As noted above, the amendment as to religious institutions was changed only to broaden the religious discrimination exemption to which they were already subject under the 1964 act to all its activities, not only religious activities.

> ". . . it seems appropriate that persons employed by religious corporations and associations should be given equal employment opportunity with persons in comparable positions by secular employers."

He continued that they (religious organizations) should not be allowed to become "instruments of individious and unreasonable discrimination". (118 Cong. Rec. No. 11, S929, February 1, 1972.)

The scope of this limitation as being to religious discrimination only and then only as to religious activities was again emphasized by House sponsor Congressman Erlenborn. (118 Cong. Rec. No. 35, H1862, March 8, 1972.)

Other statements of sponsors in the Senate debate indicate the limitation intended to exempt clergymen from the religious discrimination provisions while in performance of religious services, a very narrow exception. Nowhere does the Congressional intent or plain meaning of the very specific wording of Sec. 702 suggest the interpretation rendered by the court below.

On the contrary, the intent of the legislation is clearly to include the church-minister relationship within its scope except as to the right of the church to discriminate on the basis of religion in its religious activities. Thus, the Court of Appeals erred in its interpretation of the statute. It also erred in failing to resolve the substantial constitutional issue in accordance with the policy laid down by this court.

The policy, as discussed above, was clearly enunciated in *Shapiro* v. *United States,* 335 U.S. 1 (1948):

> "The canon of avoidance of constitutional doubts must, like the "plain meaning" rule, give way when its application would produce a futile result, or an unreasonable result plainly at variance with the policy of the legislation as a whole." (p. 31).

II.

Had the Court of Appeals correctly applied the doctrine of avoidance of the constitutional question it would have finally come to grips with the issue of the constitutionality under the Religious Clauses of the First Amendment of the provisions of Title VII of the Civil Rights Act which include within its purview religious organizations with the exception of religious discrimination.

The court examined this issue, suggested that if it were to rule on the constitutionality, it would find encroachment and then retreated behind a finding Congressional intent. The court's review and suggested conclusion of encroachment have misinterpreted and misapplied the line of cases dealing with the free exercise of religion, and governmental interest.

Particularly the court relied on *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church,* 393 U.S. 440 (1969). In that case, the court declined to resolve a controversy involving church property because to do so would involve adjudicating issues of religious doctrine and practice. But the court made it clear that there were controversies involving religious bodies which were within the jurisdiction of civil courts and that the criteria was whether those controversies involved religious teachings. If the dispute does not touch upon purely eccleasiastical matters and presents no danger of impinging on "free development of religious doctrine", it may be within the purview of civil litigation. The court indicated it would take jurisdiction if the property questions could be so structured as to not require inquiring into ecclesiastical matters.

Again in *Gonzalez* v. *Roman Catholic Archbishop,* 280 U.S. the court refused to intervene because "matters purely ecclesiastical" were involved. There the refusal of the church to appoint the aggrieved party to a chaplain position was based on qualifications grounded in canon law. The Court properly refused to allow secular courts to be used to adjudicate canonical law.

The lower court also relied upon *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94 (1952), but even there the refusal to interfere in selection of clergy was because there was no improper method of choice proven. The court suggested that if such were the case it might indeed adjudicate the rights of the parties.

Each of these cases is careful to limit constitutional protection to purely religious matters. Each is distinguishable from the case at bar. Petitioner here does not ask the court to adjudicate basic tenets of faith, canonical questions or ecclesiastical issues. A determination that the relationship between petitioner and respondent is covered by Title VII will not infringe upon religious matters of the Salvation Army.

Free exercise of religion does not mean freedom to violate the civil and constitutional rights of individuals or freedom to disobey laws not relating to religious practice. Yet, the position argued by the respondents would provide religious bodies with that opportunity.

The test laid down in *Sherbert* v. *Verner,* 374 U.S. 398 (1963) was whether the statute in question, although secular in purpose, imposed any incidental burden on the free exercise of religion and, if so, whether there was a compelling state reason to justify that burden. A statute which is primarily secular in purpose and effect, but imposes secondary restraints upon the free exercise of re-

ligion will be held unconstitutional unless Congress advances cogent reasons for its restrictions. The Civil Rights Act of 1964 is clearly secular in its purpose and effect. Congress has acted under constitutional authority to guarantee equal protection in employment consonant with the Fourteenth Amendment and its power to legislate on matters of public welfare and regulate interstate commerce. The primary purpose of Title VII is to provide equal economic and employment opportunity to individuals. The primary effect is upon employers of twenty-five or more persons, most of whom are secular and a few who are religious organizations.

The adoption of Title VII was even urged by numerous religious groups because they saw the need for enforcement of civil rights on secular bodies. Insofar as its provisions relate to religious organizations, it does so tangentially in an effort to bring all employers within its scope. Respondents fail to show that any burden is placed on its exercise of its religious beliefs and practices. It does not contend that its beliefs require or even allow for different treatment of women and men officers. It has not established that its preaching of the gospel, its religious functions or matters pertaining to ministry will be in any way affected by a finding that the relationship of petitioner and respondent here is within the meaning of Title VII. There is no element of coersion or constraint upon free exercise here.

If this legislation be coercive upon First Amendment religious freedoms, then a doubt is cast upon other public interest legislation. This court has long recognized that there are areas of public welfare, safety and interest that justify regulation of or extension to religious organizations. Thus, the churches are subject to the Internal Reve-

nue Code, corporation codes, the Fair Labor Standards Act, and the Occupational Health and Safety Act of 1971, to name a few. The latter two treat religious organizations as employers. Parochial schools have been required to meet state educational requirements. (*Pierce* v. *Society of Sisters,* 268 U.S. 510 (1925). Statutes requiring closing of public places on Saturday and Sunday have been upheld. (*Braunfeld* v. *Brown,* 366 U.S. 599 (1961); *Prince* v. *Commonwealth of Massachusetts,* 321 U.S. 158 (1944); *Gallagher* v. *Crown Kosher Super Market,* 366 U.S. 617 (1961); and *McGowan* v. *Maryland,* 366 U.S. 420 (1961)). State child labor laws have been held to apply to minors distributing religious literature.

Even this court's most recent expression on religious freedom, while upholding the right of Amish parents to withhold their children from required public school attendance as a protection of their religious freedom, still made it very clear that ". . . activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, of the Federal Government in the exercise of its delegated powers." (*Wisconsin* v. *Yoder,* —— U.S. ——, 92 S. Ct. 1526, 1535 (1972). The impact found so repugnant in *Yoder* was the criminal penalty to which the parents were subjected in "performing acts undeniably at odds with fundamental tenets of their religious beliefs." (at p. 1524.)

In balancing First Amendment guarantees and public interest, it has already been held that where the religious practices and beliefs are so repugnant to the public good or morals, restricting legislation will be upheld. (*Reynolds* v. *United States* 98 U.S. 145 (1971).

Important to note here is that questions of belief and practice are not interfered with. The Salvation Army

agrees that its religious board practices and beliefs do not allow for different treatment of men and women. The controversy here is over matters temporal and it is these matters that have been subject to regulation under other legislation upheld by this court and is the subject of Title VII.

The Congress has a very great interest in obtaining equal employment opportunities for all citizens regardless of race, national origin or sex. That concern is so great that Congress extensively expanded the coverage and enforcement of Title VII. In so doing, it retained the provisions over religious institutions, once again confirming its interest.

Religious organizations, churches and schools employ large numbers of persons. Some of these persons perform partial ministerial duties along with secular or non-ecclesiastical duties. Some, because of the nature of the religious groups with which they are affiliated are designated ministers, officers or practitioners while in other religious organizations they would be considered teachers, secretaries or administrators. To allow the respondent to place petitioner and others similarly situated outside the purview of the statute by designating them as ministers is to subvert the intent of Congress.

Congress clearly did not intend to exclude from coverage persons who performed duties such as those performed by petitioner even when they are deemed by her employer to be ministerial in nature.

What the Salvation Army seeks by the interpretation it urges, is to place itself beyond all legislative restriction even on temporal or secular matters.

Just as Mr. Justice Douglas remarked in *Tilton* v. *Richardson* that "The mounting wealth of the churches makes ironic their incessant demands on the public treasury" (—— U.S. ——, 91 S. Ct. 2091, 2104 (1971), so too it is ironic that respondent whose teachings urge equal treatment of women and men, argues that it should be exempted from the enforcement its secular, less moralistic, counterparts are subject to.

Petitioner, however, is not asking the civil courts to enforce the doctrine of equality enunciated by her church, but that the civil laws pertaining to non-discrimination be enforced insofar as they relate to matters of salary, benefits and employment opportunities. She is not asking, as the candidate-bishop in *Gonzalez*, supra, that canonical law be interpreted or that church doctrine be enforced as in *Presbyterian Church* v. *Hull*, supra.

She is praying that her civil rights to fair and equal employment practices be guaranteed as it is to employees of other organizations. Indeed, if the court holds that regulation of the church-minister relationship to the extent of preventing race, sex and national origin discrimination is restrictive of the First Amendment religious clauses, it will effectively remove thousands of persons from protection of important civil and constitutional rights.

Persons such as Mrs. McClure, who are members of groups that have very broad definitions in categories of ministers, in other words, positions which include specifications far beyond the traditional concept of minister, stand in jeopardy of violation of their own individual religious freedoms. By exercising their free choice to become ministers in their chosen faith, they are forced to relinquish civil and constitutional rights of equal protec-

tion under the laws. In accordance with the lower court conclusions, if Mrs. McClure had performed many of the assigned functions in the employ of many other religious bodies, her employment would not have been designated "minister" and she would be covered under Title VII.

The result is that Mrs. McClure is excluded from benefits of public welfare legislation by reason of her religious beliefs. (See: *Everson* v. *Board of Education,* 330 U.S. 1 (1947).

In holding S. 702 of Title VII of the Civil Rights Act of 1964 as not violative of the religious clause of the First Amendment, this court would be carrying out the intent of Congress and would be deciding consistently with the earlier expressions protecting First Amendment freedoms.

Certiorari should be granted because the Court of Appeals misapplied and misconstrued the doctrine of constitutional avoidance and, therefore failed to resolve important federal and constitutional questions which this court should settle.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Attorney for amicus curiae

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

Supreme Court, U.
FILED
NOV 2 1972
MICHAEL RODAK, JR.,

MRS. BILLIE MCCLURE,

Petitioner,

—v.—

THE SALVATION ARMY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

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November 2, 1972

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-134

MRS. BILLIE MCCLURE,

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—v.—

THE SALVATION ARMY,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

Petitioner respectfully moves this Court for an order: (1) vacating its denial of the petition for writ of certiorari, entered on October 10, 1972; and (2) granting the petition.

As grounds for this petition, petitioner states the following:

I.

The denial of the petition for a writ of certiorari for want of timeliness appears to announce a new rule of law.

On October 10, 1972, this Court entered an order denying certiorari in this case, accompanying the denial with the unexplained statement that the petition was denied "for the reason that the petition was not timely filed." The

petition, however, was filed on July 24, 1972, which was within ninety days of the action of the Court of Appeals for the Fifth Circuit in partially granting and partially denying a timely petition for rehearing, so designated, which had been filed in that court by petitioner herein.[1] The issues presented by the rehearing petition below are presently before this Court; see footnote 4, *infra.*

This Court's unexplained statement that the petition for certiorari was not timely filed has taken petitioner completely by surprise; while it is true that respondent, in its brief in opposition to the granting of certiorari, raised several arguments concerning the timeliness of the petition, petitioner believed that her reply brief, filed on September 15, 1972, had made clear that none of the authorities cited by respondent in any way supported the argument that the petition was not timely.

Counsel for petitioner respectfully state to this Court that after diligent research, not a single case or other authority has been found which even intimates that a petition for a writ of certiorari in a civil case may be denied for want of timeliness, where, as here, (1) the petition was filed within 90 days of the disposition by a United States Court of Appeals, (2) of a petition for rehearing in that court, (3) so designated, and (4) timely filed. The rule that such a petition for certiorari is timely has been

[1] This Court has in the past granted petitions for certiorari which had previously been denied, where the denial had been based on a defect in jurisdiction subsequently shown by a petition for rehearing to have been cured or to have been nonexistent. Cf. *Cafeteria Employees Union, Local 302* v. *Angelos,* cert. denied, 319 U.S. 753, cert. granted, 319 U.S. 778 (1943); *Bakery & Pastry Drivers* v. *Wohl,* cert. denied, 313 U.S. 572, cert. granted, 313 U.S. 548 (1941); *Brady* v. *Terminal R.R. Ass'n,* cert. denied, 302 U.S. 688, cert. granted, 302 U.S. 678 (1937); and see Stern & Gressman, SUPREME COURT PRACTICE, §15.7 at p. 526 (4th ed. 1969).

applied with absolute uniformity regardless of the nature of the case involved, or of the contents of the petition for rehearing in the lower court. See especially, *United States* v. *Healy,* 376 U.S. 75, 77-80 (1964), and cases cited. See also Stern & Gressman, SUPREME COURT PRACTICE, §§6.3-6.4, at pp. 248-252 (4th ed. 1969).

If this Court indeed intended by its order of October 10, 1972, to announce a new doctrine, limiting the effect of a petition for rehearing in the court of appeals, in tolling the permissible time for petitioning for certiorari, it is respectfully submitted that at the least, this Court should make clear to the members of its Bar the extent of the new doctrine and its full ramifications. The effect of the October 10 order is to leave in doubt whether it is intended that *no* petition for rehearing is of any effect in tolling the 90-day period, or whether such tolling effect depends upon the contents of the petition.[2]

Should this Court adopt a rule whereby a timely petition for rehearing in the court below could be of no effect, or only limited effect, in tolling the period for seeking certiorari, such a rule would have the most unfortunate consequences for the orderly administration of justice.

Should it be determined that a rehearing petition could never have any tolling effect, this Court would then be faced repeatedly with petitions for certiorari filed while the court below was still considering a petition for re-

[2] It is clear that subsequent editions of treatises and manuals on Supreme Court practice will have to take note of this Court's order, as modifying the prior consistent practice of this Court. (Conversation between counsel for petitioner and Eugene Gressman, Esq.) But we respectfully urge that the full impact of the change intended to be wrought is no clearer to the treatise writers than to counsel for petitioner.

hearing. Such petitions would of necessity be seeking review of decisions still readily subject to change by the court below, and plainly wanting in that degree of finality necessary for this Court's review. Cf. *Leishman* v. *Associated Wholesale Elec. Co.*, 318 U.S. 203, 205 (1943); *Department of Banking* v. *Pink*, 317 U.S. 264, 266 (1942).

As this Court has observed in the past, in similar circumstances, such a ruling:

> "... could, in some cases, impose an added and unnecessary burden of adjudication upon this Court. It would be senseless for this Court to pass on an issue while a motion for re-hearing is pending below...." *United States* v. *Healy, supra,* 376 U.S. at 80 (footnote omitted).

Similarly, if this Court adopts a rule that the tolling effect of a timely petition for rehearing in the court below is dependent upon the content of that petition, cautious counsel would assuredly deem it the only prudent course to file a petition for certiorari before the lower court had disposed of a rehearing petition. Otherwise petitioner and counsel would invariably run the risk that the petition may be found not to have raised sufficient substantive matters to have tolled the running of the period for petitioning for certiorari.

Such a rule would also add substantially to the already heavy burdens of the courts of appeals. Surely no attorney seeking rehearing of any portion of such a court's ruling would dare to neglect raising any remotely conceivable ground for rehearing, no matter how futile, for fear that the rehearing petition would later be found not to reach

matters sufficiently substantive to have tolled the 90-day period.

Indeed, in the present case, counsel for petitioner in the court below made no secret of petitioner's dissatisfaction with that court's ruling.[3] Rather, however, than waste the time of both counsel and the court in presenting anew arguments which the court had already rejected unanimously, counsel presented only those arguments which appeared to have the greatest likelihood of rehearing.[4] Surely it is not the intention of this Court to encourage counsel to act otherwise. Nor should this Court's jurisdiction be defeated simply because counsel for appellant in the Court of Appeals did not add to the petition for rehearing the five additional words: "Appellant renews all prior arguments."

II.

Consideration of this Court's jurisdiction should at least be postponed until it may be fully briefed and argued by the parties.

While it is not the usual practice of this Court to permit argument on the issue of whether certiorari should be granted, there are nevertheless exceptions "where there are serious jurisdictional problems in a case involving other-

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[3] "Appellant's silence with regard to the other aspects of the Court's judgment should not be construed as indicating agreement therewith." See Brief of Respondent in Opposition to Petition for Certiorari, at 27.

[4] It should also be observed that the main argument of the petition for rehearing went to the very important question of provision for costs in an equal employment case where private counsel is necessary. Relief was granted in part and denied in part by the court below in its disposition of the petition for rehearing, and the question was placed before this Court by the petition for certiorari (see Point IV, pp. 23-25).

wise important issues, making it inappropriate to deny the petition summarily . . . " Stern & Gressman, SUPREME COURT PRACTICE, §5.3, at pp. 207-208 (4th ed. 1969). See, e.g., *Hannah* v. *Larche,* 361 U.S. 910, 363 U.S. 420, 423-424 (1960); *Boynton* v. *Hutchinson Gas Co.,* 291 U.S. 656, 292 U.S. 601 (1934), as discussed in *Coleman* v. *Miller,* 307 U.S. 433, 444 (1939).

The present case is precisely such an important case, and should not be summarily denied. Without repeating the matters raised in the petition for certiorari, suffice it to say that there are involved questions of the rights of many thousands of female employees of religious organizations, and of whether Congress may enact equal employment opportunity legislation to protect these rights without transgressing the commands of the Constitution.[5]

Moreover, the many considerations of judicial administration and efficiency which we have already discussed (see Point I, *supra*) surely would favor this Court's not reaching a summary decision without the benefit of full briefing and argument on the issues raised.

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[5] As a further indication of the importance of this case, petitioner would note the filing of a brief *amicus curiae* by the National Organization for Women. Petitioner has also been informed that numerous religious bodies within the United States have expressed their great interest in obtaining a resolution of the issues here presented and are considering the filing of briefs *amici curiae,* should certiorari be granted.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for a writ of certiorari, petitioner prays this Court to grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

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November 2, 1972

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* Passed New York bar examination, and currently awaiting admission.

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for re-hearing is presented in good faith and not for delay, and is restricted to the grounds specified in Rule 58(2) of the Rules of this Court.

MARVIN M. KARPATKIN